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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1712~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

APPENDIX

To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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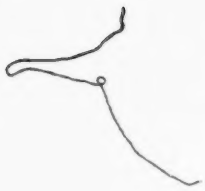

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WOODS EXPLORATION & PRODUCING CO., INC., ET AL.
v.
ALUMINUM COMPANY OF AMERICA, ET AL.

Civ. A. No. 14669

United States District Court
S. D. Texas,
Houston, Texas.

March 29, 1968

Memorandum and Order

SINGLETON, District Judge.

In December, 1962, plaintiffs, Woods Exploration & Producing Company, Stanley C. Woods, and Southeastern Pipe Line Company, filed the instant antitrust action against defendants, Aluminum Company of America, Crown Petroleum Corporation and Lavaca Pipe Line Company,[1] seeking injunctive relief and treble damages for alleged violations of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1, 2, 15, 26 (1964). By their complaint, plaintiffs charged that defendants had restrained trade in the production and marketing of natural gas from the Appling Gas Field in Jackson and Calhoun Counties, Texas, and that defendants had monopolized and/or attempted to monopolize the production and marketing of gas from the field. Plaintiffs sought to recover as damages the loss of production from their wells in the field which had been occasioned by the entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' wells at levels lower than plaintiffs thought they should have received. Plaintiffs sought to hold defendants liable

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[1] Plaintiffs also named as defendants certain employees of the defendant corporations. By stipulation and through the filing of their Third Amended Complaint, however, plaintiffs have dropped these parties as defendants.

for this loss on the ground that the Railroad Commission orders had been based, at least in part, on false nomination forecasts and reports filed by defendants with the Commission.

Defendants responded with a motion to dismiss for failure to state a claim, and, in the alternative, a motion for summary judgment. Both motions were overruled by another judge of this district, Woods Exploration & Producing Co. v. Aluminum Company of America, 36 F.R.D. 107 (S.D.Tex.1963), and in October, 1963, the Court of Appeals for the Fifth Circuit denied with the following order defendants' attempted interlocutory appeal from the order overruling their motion to dismiss.

> "Since the order sought to be reviewed is merely the denial of a motion to dismiss the complaint, leave to take interlocutory appeal should be, and it is hereby DENIED, *but without prejudice to an application in the future from any appropriate order made by the District Court after completion of pretrial discovery or other pretrial procedures revealing the factual basis for the respective claims and defenses as distinguished from mere pleadings.*" (Emphasis Added.)

In 1966, the case was transferred to this court as a docket equalization measure. Now, after the completion of extensive pretrial discovery, defendants have again moved for summary judgment. After reviewing thoroughly the numerous briefs filed by each side, as well as conducting an oral hearing on the motion, I feel compelled to disagree with the conclusion reached by my brother judge in his 1963 decision.

Before proceeding to the merits of the motion, however, I feel some comment is in order regarding plaintiffs' contention that this Court is without the power to entertain

the motion — that the prior ruling by a different judge has become the law of the case. In view of the fact that I reach the merits, needless to say I disagree. The wording of the appellate court order seems to invite the current motion, and, moreover, the law does not require a judge who will ultimately handle a case to decline to make an independent and objective determination of issues which are properly raised. Rather, whether to go into the merits of a question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge. See Beedy v. Washington Water Power Co., 238 F.2d 123, 127 (9th Cir. 1956). See also 3 Barron & Holtzoff, Federal Practice & Procedure § 1192 (Wright ed. Supp. 1966); 1B Moore, Federal Practice, Para. 0.404[4], at 452. As stated by the Court in Ward v. Louisiana Wildlife Comm'n., 224 F.Supp. 252 (E.D.La. 1963),

> "A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, *the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well established* * * * . *The United States Supreme Court has rejected a doctrine of disability at self correction* * * *." *Id.* at 255. (Emphasis Added.)

By amended complaint, plaintiffs have now specified various other activities of the defendants taken pursuant to the alleged conspiracy. In large part, these allegations relate to a course of litigation either initiated by defendants or which was brought about by defendants' successful efforts to influence the Railroad Commission in setting field orders which applied to the Appling Field. Since the same basic principles which apply to the allegations concerning

the filing of false nominations apply alike to the latter allegations, they will also be considered.

After reviewing the numerous depositions and papers filed in the case, it is clear that there are disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false nominations or brought about the litigation in question as part of a conspiracy. However, even if plaintiffs' allegations in these respects are true, plaintiffs would still not be entitled to recover damages for these activities. Thus for the purposes of this motion, I accept plaintiffs' basic allegations as true. Liberty Leasing Co., Inc. v. Hillsum Sales Corp., 380 F.2d 1013, 1014-15 (5th Cir. 1967).

FILING OF FALSE NOMINATIONS

A. *The Factual Context.*

Plaintiffs own, operate, or have an economic interest in wells drilled on small tracts located within a fifty-nine acre area lying in the heart of the Appling Gas Field. Most of plaintiffs' wells have been drilled as exceptions to the general spacing rule which restricts the drilling of wells to one well every 320 acres.[2] Defendants, on the other hand, own or have an interest in wells which have been drilled

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[2] Statewide Rule 37, Tex. R.R. Comm'n Rules & Regs. 1, at 15, Oil & Gas Rep. 1320 (1962). See generally Hardwicke & Woodward, Fair Share and the Small Tract in Texas, 41 Texas L.Rev. 75 (1962); Hardwicke, Oil-Well Spacing Regulations and Protection of Property Rights in Texas, 31 Texas L.Rev. 99 (1952). Most of plaintiffs' wells were drilled on extremely small tracts, some being located on tracts of less than 2/10 of an acre. Defendants' First Brief in Support of Summary Judgment, p. 3; Plaintiffs' First Opposition Brief, p. 2. See generally Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex.1964), reversing 368 S.W.2d 818 (Tex.Civ.App.—Austin 1963).

on large tracts subject to the general spacing rule. The allowable production which each well in the field is permitted to produce is set monthly by order of the Texas Railroad Commission. For the purpose of preventing waste, the Commission is charged with the task of limiting total production from the field to the reasonable market demand for gas made upon the field. Tex.Rev.Civ.Stat.Ann. art. 6008 § 3(h) (1964). Each producing well is entitled to its fair share of the total allowable field production, *id* § 12, an amount which has been held to be roughly equivalent to the gas in place under the tract on which the well is drilled.[3]

In the Appling Field, after first determining the total allowable for the field, the allowable for each well is determined by application of a one-third—two-third proration formula. One third of the field allowable is divided equally among the wells, and two-thirds is divided among the wells in the proportion to which the surface acreage on which the well is drilled bears to the combined surface acreage of all wells in the field. The heavy weight given to the well factor by this formula has meant that producers with wells on small tracts have been permitted by the Commission to extract far more gas than that underlying their tracts, thereby draining gas from beneath the larger

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[3] Where the lessee or owner of a small tract has been granted a permit to drill a well as a Rule 37 exception, this means that "it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give the owner of such smaller tract only his just proportion of the oil and gas. *By this method, each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land.*" Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 944 (1935). (Emphasis Added.) See also Manufacturer's Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N.E. 912, 50 L.R.A. 768 (1900). In some instances, and particularly in the Appling Field, this "ideal" allocation of gas has not been attained. See Notes 4 and 5 *infra*.

adjoining tracts.[4] The inequitable effect of the formula has been compounded, moreover, by the fact that many wells on large tracts, although producing at full capacity, have been unable to produce even the allowable assigned to them under the formula. As a result the amount they have been unable to produce has been allocated by the Commission to the small-tract wells not already producing at full capacity.[5] It is in this context that the plaintiffs complained of

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[4] The one-third — two-third formula was declared invalid by the Texas Supreme Court in Atlantic Ref. Co. v. Railroad Comm'n., 162 Tex. 274, 346 S.W.2d 801 (1962), on the ground that it allowed small-tract owners to produce more than their fair share and amounted to confiscation of gas underlying the large tracts. In Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex. 1964), however, the court upheld the formula insofar as it applied to the Appling Field on the ground that the large tract owners were guilty of laches in attacking it. Although the court recognized that small-tract owners had drained substantial quantities of gas from beneath the large tracts, and had recouped their costs and made a profit, and would during the the life of the field drain several million dollars worth of gas from beneath tracts leased to Aluminum Company of America alone, id. at 604, it found other factors to be more persuasive.

> "There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business." *Ibid.*

[5] Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 316 (Tex.1966).

> "An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500′ and 18 wells were completed therein. Seventeen of these wells were located on 7.132 acres, while the remaining well was situated on a 328 acre unit. * * * The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts results in the determination that reasonable

defendants' filing false production forecasts which reduced the total field allowable.

B. *The Nomination Procedure.*

As previously stated, the total allowable for a field is set at what the Railroad Commission determines to be the reasonable market demand for the field's gas. No statutory provision prescribes the procedure by which market demand is to be determined, and thus the matter falls under the rule-making power of the Commission. The usual procedure which the Commission follows is set out in Statewide Rule 31. Under its provisions, market demand is ordinarily determined primarily on the basis of Producer's Forecasts filed with the Commission by operators having wells in the field. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month. The nominations are totaled and, if the Commission concludes that their total accurately reflects market demand, the total becomes the field allowable to which the one-third—two-third formula is applied. If the Commission disagrees with the forecasts, however, it may consider other factors such as average production for the previous twelve months, or nominations filed by purchasers of gas. Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 315 (Tex. 1966). In most instances in the Appling Field the producer's forecasts are

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market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic ⅓ — ⅔ allocation formula, the large tract well was entitled to an allowable of 591,000 MCF. * * * The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 557,000 MCF were allocated to the [small tract] wells * * ** in addition to their shares of the reservoir allowable as determined by application of the ⅓ — ⅔ formula." *Ibid.*

corrected by the difference between the total of the current nominations and total actual production which was allowed for the second preceding month.[6]

C. *The Liability Issue.*

Whether plaintiffs can recover for the loss of production they allegedly suffered as a result of the low allowables set by the Railroad Commission involves a now rather undeveloped area of federal antitrust law. As state regulation of the economy increases, however, and particularly in the area of conservation, it can easily be predicted that many questions will arise similar to those raised in the instant case.[7]

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[6] Under this method of determining the field allowable, the following calculations would be involved.

(a) Total nominations for Second Preceding Month	110
Total allowable for non-prorated wells for Second Preceding Month	20
Total nominations for Prorated Wells for Second Preceding Month	90
Total Actual Production of Prorated Wells in Second Preceding Month	80
Difference	10
(b) Total Nominations for Current Month	110
Difference Between Total Nominations and Actual Production in Second Preceding Month	—10
Total Field Allowable for Current Month for All Wells	100

Tex. R.R. Comm'n Rules & Regs. Appendix, at 39; see Parris & Edgerton, Non-Associated Gas Proration 4 (1961). See also Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 98-99 (5th Cir. 1966).

[7] In some instances, Congress has recognized that there is a basic conflict between the competitive thrust of the antitrust laws and the anticompetitive thrust of state regulatory schemes. For instance, in the area of insurance, Congress has sought to eliminate friction which might result because of simultaneous application of state and federal law.

The starting point in this and any other antitrust case not involving a matter of per se illegality is Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 51-52, 31 S.Ct. 502, 55 L.Ed 619 (1911), in which the Supreme Court announced the "rule of reason" as the test for determining the applicability of the antitrust laws to a given situation. Pursuant to this test, it has been held consistently that as a matter of statutory interpretation the Sherman Act does not apply to the actions of a state. As stated by the court in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943):

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance • • • unless such Act *specifically* relates to the business of insurance: Provided, That • • • [the federal antitrust laws] shall be applicable to the business of insurance *to the extent that such business is not regulated by State law.*" (Emphasis Added.)

McCarran Ferguson Act, 15 U.S.C. § 1012(b) (1963); see Miley v. John Hancock Mut. Life Ins. Co., 148 F.Supp. 299 (D.Mass. 1957). A comparable forthright approach to resolving similar conflicts in the oil and gas area would not be inappropriate, for there are many parallels between state regulation of both industries, state regulation of both being equally comprehensive and detailed.

The federal courts have been careful to avoid applying the Sherman Act where its application might conflict with the Federal Power Commission's regulation of the natural gas industry. Interstate Nat. Gas Co. v. Southern California Gas Co., 102 F.Supp. 685, 103 F.Supp. 317 (S.D.Cal.1952), aff'd), 209 F.2d 380 (9th Cir. 1953). Moreover, the activities made the subject matter of the instant suit involve Railroad Commission regulations concerning the production and gathering of natural gas from the Appling Field, and this subject Congress has chosen to exempt from federal supervision in favor of state regulation. Natural Gas Act, 15 U.S.C. § 717(b) (1963). Therefore, since these activities are subject to exclusive regulation by the Texas Railroad Commission, a like caution and deference should be shown when the alleged Sherman Act violation involves Railroad Commission regulations and matters subject to the Commission's exclusive jurisdiction.

> "[There is] *nothing* in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Id. at 350-351, 63 S.Ct. at 313.

Accordingly, the states have been left free to regulate industries within their boundaries by curtailing competition or eliminating it altogether, Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 505 (4th Cir. 1959), subject only to the limitations inherent in the commerce clause or any restrictions imposed by federal statutes. However, when a private party as opposed to a state itself has been sought to be held liable for damages resulting from restraints imposed by a state, the cases reflect more than a little uncertainty on whether, and in what situations, the private party whose improper conduct is the reason the state has imposed a trade restraint is immune simply because the restraint was imposed by the state.[8]

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[8] For example, in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), three cases which were finally decided in the Supreme Court, the lower courts were reversed for imposing liability. Also, there appears

In Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5L.Ed.2d 464 (1961), forty-one Pennsylvania truckers and their trade association brought suit against twenty-four railroads and an association composed of the presidents of each railroad. The truckers charged that the railroads had conspired to restrain trade in and monopolize the long-distance freight business in violation of the Sherman Act. The essence of the conspiracy was that the railroads had conducted a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. The campaign proved successful, for the railroads persuaded the governor of the state to veto a "Fair Truck Bill" which would have permitted the truckers to haul heavier loads over the state's highways. Moreover, the publicity campaign had the additional effect of destroying much of the truckers' good will. The district court found that the publicity campaign was fraudulent and malicious and that its sole purpose was to destroy the truckers as competitors even though no legislation was secured. For this reason, it awarded substantial damages for the truckers' loss of good will. However, the district court was also of the view that restraints of trade and monopolizations resulting from valid governmental action are not actionable under the Sherman Act and thus refused to award damages for the loss of business caused by veto of the "Fair Truck Bill."

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to be a conflict on whether joinder of the state official who uses his office to impose the restraint makes a difference on whether the private party can be held liable. *Compare* Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964), *with* Miley v. John Hancock Mut. Life Ins. Co., 148 F.Supp. 299 (D.Mass. 1957). See also E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966). In the instant action, there is no issue concerning the liability of the Railroad Commission or any individual member thereof.

Noerr Motor Freight, Inc., v. Eastern Railroad President's Conf., 166 F.Supp. 163, 172-73 (E.D.Pa. 1958). The Court of Appeals affirmed with one judge dissenting. Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 273 F.2d 218 (3d Cir. 1959). Applying the "rule of reason", however, the Supreme Court reversed, holding that the truckers could as a matter of law recover no damages for injury sustained because of the efforts of the railroads to influence governmental action.

In reaching this result, the Court noted that there was an "essential dissimilarity" between the lobbying activities conducted by the railroads and the activities normally prohibited by the Act, and that to impose liability for this conduct would raise serious constitutional questions and political difficulties.

> "We think it * * * clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt *to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.* * * * [The railroads' activities] bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or *law enforcement* and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. * * * [Moreover, to impose liability] would substantially

> impair the power of government to take actions through its legislature and executive that operate to restrain trade. * * * To hold that the government retains the power to act in this representative capacity and yet hold * * * that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Id. 365 U.S. at 136-138, 81 S.Ct. at 529. (Emphasis Added.)

Plaintiffs seek to distinguish *Noerr* on the ground that it exempts only "political activity" from the scope of the Sherman Act and thus is not controlling for they contend, the filing of false nomination is properly "business activity" and not "political activity" protected by *Noerr*. This proffered distinction, I think, places more emphasis than is warranted on the phrase "political activity," as used by the Court in *Noerr*. Plaintiffs contend that protected "political activity" encompasses only lobbying activities or influence peddling and does not apply to a situation such as this where the defendants and all other producers are required by Commission regulations to submit nominations under oath. There is some doubt whether this line of reasoning is accurate. In Sterling Nelson & Sons, Inc. v. Rangen, Inc., 235 F.Supp. 393,400 (D.Idaho 1964), for example, the Court held that there was no liability even though the defendant had bribed a state official to use his position to impose a trade restraint harmful to the plaintiff. In addition, it has been held in other cases that there is no liability although the conduct complained of violates a valid

state penal statute[9] or even though the conduct gives rise to a civil cause of action under state law.[10] If activities of this character are not within the ambit of the antitrust laws, then it is difficult to perceive how the activities of the defendants here can be viewed differently. However, it is unnecessary to resolve the issue on a determination that the filing of false nominations is or is not political activity. The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party.

Plaintiff's limited construction of *Noerr* ignores the fact that the Supreme Court did not disapprove the district court's holding that the truckers could recover no damages for injury resulting from any valid action of the state. See 365 U.S. at 135-136, 60 S.Ct. 982. In Parker v. Brown, supra, and United States v. Rock Royal Cooperative,, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1938), the Supreme Court had previously upheld goverment regulatory schemes involving the production and marketing of milk and raisins even though the schemes permitted and required some participation by the producers affected. In both cases, the Court held that the regulation itself was not invalid because it constituted a restraint on trade and also that the

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[9] *E. g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 483, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961); Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n., 272 F.Supp. 872 (D. N.J. 1967).

[10] *E. g.*, Hunt v. Crumbock, 325 U.S. 821, 826, 65 S.Ct. 1545, 89 L.Ed. 1954 (1945); Apex Hosiery Co. v. Leader, *supra* note 9, 310 U.S. at 483, 60 S.Ct. 982; Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (1962); Parmelee Transportation Co. v. Keeshin, *supra* note 9, 202 F.2d at 804; Sterling Nelson & Sons, Inc. v. Rangen, Inc., *supra*, 235 F.Supp. at 400.

producers who were benefitted by the regulation and who were instrumental in initiating it could not be held liable in damages.

In United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed. 2d 626 (1965), decided four years after *Noerr*, the Mineworkers' Union and several large coal producers conspired to drive smaller coal producers out of business. In furtherance of the conspiracy, they persuaded the Secretary of Labor to set a higher minimum wage for the employees of coal producers selling to the TVA and induced the officials of TVA itself to reduce the number of the TVA's "spot market" purchases — many of which were exempt from the minimum wage requirements of the Walsh-Healey Act. The district court awarded substantial damages, and the court of appeals affirmed, distinguishing *Noerr* on the ground that although the conduct complained of might be lawful when standing alone, it became unlawful when shown to be a constituent part of a larger, unlawful conspiracy. Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963). The Supreme Court reversed, but in doing so chose not to rest its decision alone on the ground that the activity was protected "political activity" within the meaning of *Noerr*. Rather the Court went further and interpreted *Noerr* more broadly:

> "There is another reason for remanding this case for further proceedings in the lower courts. *It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which is suffered from the action of the Secretary of Labor.* The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and *the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.*" *Id.* 381

U.S. at 671,, 85 S.Ct. at 1594. (Emphasis Added.) See also United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D.Pa.1966).

Perhaps of even more significance than this statement in the opinion is the fact that the Court cited with approval the decision of the court of appeals in Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), a case which is closely in point with the instant action. In *Okefenokee,* the plaintiff brought suit against Florida Light & Power Company and the City of Jacksonville, Florida, alleging that these defendants had "engaged in an unlawful combination and conspiracy to monopolize and exercise exclusive control over the territory" into which plaintiff was seeking to extend electric power lines. The only feasible route from an engineering and economic standpoint along which a new power line could be built lay along Federal Highway 17. On January 25, 1952, plaintiff staked a proposed line along the highway, and on February 26, 1952 it applied to the Florida State Road Department for permission to construct a line along the route. During this period, however, the defendants constructed a "spite line" along the same route for the sole purpose of defeating plaintiff's application for a permit. Only two persons could be served by the defendants' spite line, and indeed the only wire placed on the line by the City was a "neutral strand." In pursuance of the conspiracy, the City made a false argument before the Road Department that a line had already been constructed and that no new line should be built. As a result of these two actions, the Road Department denied plaintiff's application. Moreover, the defendants conducted a smear campaign against plaintiff, thereby causing the County Commissioners of Duval County to pass discriminatory regulations applicable only to plaintiff and designed to prohibit plaintiff from operating in Duval County. The district court dismissed

the complaint for failure to state a claim. The court of appeals affirmed, reasoning that since the plaintiff had no right to use the highway route without a permit from the state nor any route along the county roads without permission of the Board of County Commissioners, the plaintiff had suffered no "legal injury."

I think the principle announced in *Pennington* and *Okefenokee* is controlling as to the damages plaintiffs allegedly suffered because of the allowables set by the Railroad Commission. Plaintiffs, however, have advanced two contentions as a basis for taking their action outside the scope of these precedents. First, they seek to distinguish *Okefenokee* on its facts, but this they have not successfully done. Plaintiffs contend that *Okefenokee* is distinguishable because they have been granted a permit to drill and produce gas whereas the plaintiff in *Okefenokee* was injured because of the state's refusal to grant a permit. This distinction is tenuous at best, for its thrust is to limit *Okefenokee's* application to cases involving the denial of permits by state agencies, a limitation which is inconsistent with the Court's reasoning. As stated by Judge Biggs "implicit in [the *Okefenokee*] ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency, *however inspired by the acts of individual.*" Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 273 F.2d 218, 226 (3rd Cir. 1959) (dissenting opinion) (Emphasis Added.) Moreover, there are two crucial similarities between the two cases. In both, the injury complained of resulted directly from specific action taken by a state administrative agency on the basis of false information provided by private parties. Secondly, just as certainly as the plaintiff in *Okefenokee* had no legal right to use a particular route for the construction of a power line without the consent of the State of Florida, the plaintiffs here have no

legal right to produce an amount of gas in excess of the specific allowable assigned to them by the State of Texas acting through the Railroad Commission. See Tex.Rev. Civ.Stat.Ann.art. 6008 § 16 (1964).

Plaintiffs' second contention is that, since each producer is required by the Railroad Commission to submit production forecasts under oath so as to provide information on the basis of which the Commission sets allowables, the producers are in effect possessed of broad discretionary powers by which they set the allowables themselves and thus the case is controlled by Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

In *Continental Ore*, the plaintiff brought suit against several American corporate defendants alleging that they had conspired to restrain trade and commerce in the production and selling of vanadium and that they had conspired to monopolize the vanadium market. Among other elements of damages, plaintiff sought to recover damages which it had suffered by being eliminated from competition in the Canadian market. After Canada's entry into World War II, the Canadian Government had taken measures to assure the maximum availability of strategic metals to private Canadian industries engaged in the war effort. The Office of Metals Controller was established and given broad powers to regulate the procurement of materials and to allocate them to industrial uses. The Metals Controller delegated to a Canadian corporation, a wholly owned subsidiary of one of the defendants, the discretionary power to purchase vanadium and to allocate them to industrial users. In pursuance of the conspiracy, the parent corporation directed its subsidiary in making vanadium purchases so that the plaintiff lost all its customers and was eliminated from the Canadian market. The district court refused to award damages for this injury, and the court of

appeals affirmed. Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 89 (9th Cir. 1961). The Supreme Court, however, reversed, and with a unanimous opinion held that the parent's use of the subsidiary's discretionary power as the agent of a foreign state in order to drive a competitor out of business was actionable under the anti-trust laws.

In speaking to the defendants' contention that they could not be held liable because the injury was inflicted by an agent of a foreign state, the Court stated:

> "What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. * * * From the evidence which petitioners offered it appears that Continental complained to the Canadian Metals Controller that Continental had lost its Canadian business. * * * *But there is no indication that the Controller, or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion Continental claims, resulted from the action of Electro Met of Canada [the subsidiary], taken within the area of its discretionary powers granted by the Metals Controller and in concert with or under direction of the respondents.*" Id. 370 U.S. at page 706, 82 S.Ct. at page 1414. (Emphasis Added.)

Unlike *Continental Ore,* however, the defendants here have been delegated no discretionary power to set gas production allowables in the Appling Field. The Texas Supreme Court made clear in Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313 (Tex. 1966), that the Commission alone has the power and the duty to set allowables. The procedure followed by the Commission of requiring the producers to submit forecasts before the

allowables are set is no more than a mere "administrative device." *Id.* at 319. The figures submitted by the individual producers are not binding on the Commission, and it does not have to set allowables based on their mathematical total. Thus any injury which *any* producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Commission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State.

The injury which plaintiffs complain to have suffered here because of the allowables assigned by the Railroad Commission falls under the definition of state action set forth in Parker v. Brown, *supra,* and thus does not constitute a recoverable element of damages in a federal antitrust action.

> *"It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by a referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon referendum by a prescribed number of producers is not the impostion by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. *The state iself exercises its* • • • *authority in making the regulation and in prescribing the conditions of its application." Id* 317 U.S. at 352, 63 S.Ct. at 314. (Emphasis Added.)

As noted by the court of appeals for the Fourth Circuit:

> "The teaching of Parker v. Brown is that the antitrust laws are directed against individual and not state ac-

> tion. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." Asheville Tobacco Board of Trade, Inc. v FTC, 263 F.2d 502, 509 (4th Cir. 1959).

The scheme for settling allowables is adequately controlled by the Railroad Commisison, and under state law the plaintiffs have effective remedies to protect them against any adverse effects which might flow from the filing of false nominations. The filings of false nominations itself is a violation of state penal law.[11] Tex.Rev.Civ.Stat.Ann. art. 6036c (Supp. 1966). Additionally, the filing of false nominations will apparently support a cause of action under the state's statutory[12] and common law.[13] Simply by veiling

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[11] However, a "private antitrust complaint is not the appropriate vehicle for state criminal laws whose enforcement is entrusted to state or local prosecutors." Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesale Ass'n., 272 F. Supp. 872, 885 (D.N.J.1967). See also cases cited in note 10 *supra*.

[12] Tex.Rev.Civ.Stat.Ann. art. 6049d § 13 (1964); see Woods Exploration & Producing Co. v. Aluminum Company of America, 382 S.W.2d 343 (Tex.Civ.App.—Corpus Christi 1964, writ ref'd n.r.e).

[13] See Pan American Petroleum Corp. v. Hardy, 370 S.W.2d 904 (Tex.Civ.App.—Waco 1964, writ ref'd n. r. e.); *cf.* Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex.Civ.App.—Dallas 1962, writ ref'd n. r. e.). The fact that damages are recoverable in a civil action based on state law does not mean perforce that damages are recoverable under the Sherman Act upon a similar showing. As stated by the Supreme Court:

> "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. * * * Whether the respondent's conduct amounts to an actionable wrong subjecting them to liability for damages under [state law] is not our concern." Hunt v. Crumboek, 325 U.S. 821, 826, 65 S.Ct. 1545, 1548, 89 L.Ed.1954 (1945).

their grievance under the penumbra of a conspiracy charge, however, plaintiff's cannot convert what are in essence only violations of state law and what is primarly a matter of state concern into a federal antitrust violation. Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (7th Cir. 1962); see Natural Gas Act, 15 U.S.C. § 717(c) (1963). See also note 7 *supra*.

THE LITIGATION

The remaining allegations of plaintiffs' complaint which are involved in the present motion relate to efforts by defendants taken before the Railroad Commission to bring about a change in Commission rules and regulations and to litigation instituted or defended by defendants involving the validity of certain Commission rules and regulations. As to any efforts taken by defendants before the Commission to influence the Commission to alter old rules or promulgate new ones, it is clear that *Noerr, Pennington,* and *Okefenokee* preclude liability. Compare Ramsey v. United Mine Workers, 265 F.Supp. 388, 422 (E.D.Tenn. 1967). Moreover, if the doctrines set forth by these cases are to have any meaning, plaintiffs are likewise precluded from recovering as damages any legal or court costs which they incurred in setting the rules aside. If defendants cannot be held liable in the first instance for persuading the Railroad Commission to enter a new field rule which later becomes the subject matter of litigation, then it necessarily follows that via the back door they cannot be held liable for any loss they incurred while an order was in effect or any costs which they incurred in setting it aside. *Cf.* Fiumara v. Texaco, Inc., 204 F.Supp. 544 (E.D.Pa. 1962). This conclusion controls as to any damages which plaintiffs seek to recover because of the litigation in Railroad Comm'n v. Woods Exploration & Producing Co., *supra,* in which the Texas Supreme Court by a six to three decision struck down

a Commission order setting allowables for the field at a level lower than reasonable market demand.

The remaining litigation identified by the parties in their briefs was instituted by defendants in an attempt to stop the drainage of gas from beneath their tracts because of rules prescribed by the Commission. At lease one court has held that *Noerr* applies to such joint efforts taken in the courts by holding that "seeking lawful • • • judicial action does not violate the anti-trust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail compeltion." Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606 (S.D.Ill. 1967). But even if *Noerr* does not extend this far, the litigation of which plaintiffs complain cannot afford a recoverable element of damages, for it is clear that the suits were initiated with probable cause.

In Benz-Stoddard v. Aluminum Company of America, 368 S.W.2d 94 (Tex. 1963), suit was brought challenging the validity of a Railroad Commission order, which, by treating vertically-separate reservoirs for proration purposes, allowed small-tract owners multiple completions from a single well. There, under the challenged Commission order, a small-tract owner with a well located on a .115 acre tract had already produced more than seven times the amount of gas in place under her tract, and, if the order continued in effect, would along with other small-tract owners, be allowed to further drain gas from beneath the larger, adjoining tracts. In the second suit, Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex.1964), suit was brought challenging the validity of the one-third — two-thirds proration formula as it applied to the Appling Field. The Purpose of this latter suit was also to stop or at least curtail the huge drainage of gas from beneath the larger tracts of defendants. See note 5 *supra*. Both these cases raised points of first impression for the Texas courts.

In the first case, the defendants were successful in advancing their contentions in the court of civil appeals. See Aluminum Company of America v. Benz-Stoddard, 357 S.W. 2d 809 (Tex.Civ.App.—Austin). In the latter case, the defendants were successful in both the trial court and the court of civil appeals. Railroad Comm'n v. Aluminum Company of America, 368 S.W.2d 818 (Tex.Civ.App.—Austin). The ultimate reversal in both cases by the Texas Supreme Court does not detract from the conclusion that defendants had probable cause to file the suits in question. It is not the final disposition of a case which determines whether probable cause existed at the *outset*. The judgments of the court of civil appeals show conclusively that defendants had probable cause to believe that the challenged Commission orders were invalid. Compare Citizen's Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913); Bracken's Shopping Center, Inc. v. Ruwe, *supra*.

Therefore, it is ordered, adjudged, and decreed that the plaintiffs in this cause are not entitled to recover as damages any loss they might have suffered because of false production forecasts filed by defendants with the Texas Railroad Commission or any loss or expense which they might have suffered as a result of any litigation identified in this opinion concerning the validity of Railroad Commission rules, regulations, or orders. However, since there are other allegations in plaintiff's complaint which, if true, would entitle them to a favorable judgment, summary judgment in favor of defendents is limited to the elements of damage specified above. As to these:

This is a final judgment.

Counsel for defendents will draft and submit an appropriate order after first obtaining approval from counsel for plaintiffs.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

Civ. A. No. 14669.

United States District Court
S. D. Texas,
Houston, Texas.

October 2, 1969.

Memorandum and Opinion

SINGLETON, District Judge.

This case involves alleged violations of section 1 of the Sherman Antitrust Act[1] and an attempt to recover treble damages under the provisions of the Clayton Act.[2]

Plaintiff's are Southeastern Pipe Line Company, a corporation, which after January 1, 1961, operated a pipeline between Appling Field in Jackson and Calhoun Counties, Texas, and the Tennessee Gas Transmission A-K line to which it was connected at Francitas, Texas; Woods Exploration & Producing Company, Inc., a corporation which operated as an oil and gas business; and Mr. Stanley C. Woods. Mr. Woods owned all of the stock of Woods Exploration & Producing Company, Inc. and Southeastern Pipe Line Company.

Defendants are Aluminum Company of America, commonly referred to as "Alcoa," a corporation that does business and has operations in Texas and other states. Alcoa owned, operated, and marketed gas reserves in Jackson and Calhoun Counties, Texas, which it owned and operated with Crown Central Petroleum Corporation, commonly referred to as "Crown," including gas reserves in the Appling Field. Crown primarily manufactures motor gaso-

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[1] 15 U.S.C. § 1 (1963).
[2] 15 U.S.C. § 15 (1963).

line, lubricating and fuel oils, and does business and has operations in Texas and other states. Lavaca Pipe Line Company, commonly referred to as "Lavaca," is a corporation organized for the purpose of operating a pipeline, and is a wholly owned subsidiary of Alcoa, and Lavaca owned and operated a pipeline in the vicinity of the Appling Field in Calhoun County, Texas.

The co-conspirators in the case are alleged to have been F. E. Appling, a resident of El Campo, Wharton County, Texas, Carl E. Siegesmund (Pocantico Oil & Gas Corporation, long before the suit succeeded to all of Siegesmund's interest), and Houston Pipe Line Company, a wholly owned subsidiary of Houston Natural Gas Corporation, which was organized for the purpose of operating a pipeline and for the distribution and processing of natural gas and other commodities. This company purchased gas produced in the Appling Field, owned by Alcoa, Crown, and Pocantico and, accepted delivery at the tail gate of Alcoa's Point Comfort Plant, and transported a portion of such gas to Monsanto Chemical Company in Texas City and Chocolate Bayou, Texas.

This controversy arises out of the discovery of, the production from, and the sale and transporation of natural gas out of the Appling Field in Calhoun and Jackson Counties, Texas. This suit was originally filed in December of 1962. Initially the thrust of plaintiffs' lawsuit centered around the claim by plaintiffs that defendants had conspired together to file false nominations with the Texas Railroad Commission in an effort to restrain trade in the production and marketing of natural gas and monopolized or attempted to monopolize the production and marketing of gas from this field. This Court granted defendants' motion for summary judgment on this phase of the case.[3]

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[3] Woods Exploration & Prod. Co. et al. v. Aluminum Co. of America et al., 284 F.Supp. 582 (S.D.Tex.1968).

Litigation between the parties arising out of the subject matter of this suit has been extensive.[4] Trial of the instant case was held after plaintiffs omitted from the case the false nominations feature as a result of this Court granting defendants' motion for summary judgment. Woods Exploration & Prod. Co. et al v. Aluminum Co. of America et al., *supra,* and plaintiffs went to trial on their fourth amended petition. The trial was before a jury. The jury was asked two basic questions as follows:

> *Question No. One*
>
> Did defendants Alcoa and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?
>
> *"Question No. Two*
>
> Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, to monopolize any appreciable part of the trade and commerce of drilling for producing, and transporting gas from the Appling Field?"

The Jury answered Question No. One "No" and answered Question No. Two "Yes." There were other questions asked and answered by the jury as a result of the affirmative answer to Question No. Two, but for the purpose of this Memorandum Opinion no useful purpose would be served to detail those questions and the answers of the jury.[5] In

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[4] See generally Railroad Comm'n v. Aluminum Co. of America, 380 S.W.2d 599 (Tex.1964), reversing 368 S.W.2d 818 (Tex. Civ.App.—Austin 1963), and Woods Exp. & Prod. Co. et al v. Aluminum Co. of America et al., *supra.*

[5] With respect to the jury's answers to the other questions answered, this Court is of the opinion that there is sufficient evidence in the record to support the jury's answers to these questions.

answer to the damage issue, the jury awarded damages to plaintiff Southeastern Pipeline Company in the total amount of $142,759.00, and awarded damages to Woods Exploration & Producing Company in the amount of $500.00.

This Court grants defendants' motion for judgment notwithstanding the verdict of the jury with respect to its answer to Question No. Two.[6] In so doing, this Court, for the reasons set forth in this opinion, holds that there was insufficient evidence to support the jury's findings to Question No. Two, and the Court should have granted defendants' motion for a directed verdict at the close of the evidence.

The natural gas involved in this lawsuit is found in what is known as the Appling Field in Jackson and Calhoun Counties, Texas, and a part of this field lies under Carancahua Bay in those counties. The Appling Field was discovered in 1953. The discovery well in this field was completed as a gas producer in the Mid-Kopnicky in 1953. Defendants in this case own or have leases on approximately 90% of this field. On the perimeter of the bay is an area known as the Carancahua Townsite and generally consists of vacant, small town lots. The acreage of these lots amounts to considerably less than one-half of one per cent of the entire acreage of the field. Around 1960 plaintiffs began leasing up these small lots and commenced drill-

[6] See Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc) as it relates to the standard to be used for motions for directed verdict or motions notwithstanding the verdict in federal cases. Also, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962) wherein the Supreme Court on this particular point held that the standard to be used in jury trials in federal courts involving the Sherman Antitrust Act, in connection with motions for directed verdict or motions notwithstanding the verdict was that "the [district court] was, of course, bound to view the evidence in the light most favorable to the [nonmoving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

ing operations and completed nine or ten gas wells. The principle sand in the Appling Field is known as the Mid-Kopnicky, Segment A, and is the deepest producing sand and contains approximately 80% of the entire gas reserves in the entire area.

Plaintiffs claim that as a result of the agreements the defendants had among themselves and with the alleged co-conspirators, defendants not only attempted to prevent plaintiffs from obtaining leases on the town lot sites, but also after plaintiffs had obtained such leases defendants refused to deal with plaintiffs to enable plaintiffs to drill for, complete, transport, and market plaintiffs' gas, and defendants harassed plaintiffs in plaintiffs' efforts to drill and complete plaintiffs' wells. As stated, plaintiffs did complete nine or ten gas wells. Plaintiff Southeastern Pipeline Company built a pipeline and transported through this pipeline plaintiffs' gas for marketing purposes. However, plaintiffs contend that defendants should have allowed plaintiffs to transport gas through defendant Lavaca Pipeline Company's pipeline, or, if not, that in connection with plaintiffs building its pipeline defendants caused plaintiffs to spend more money than plaintiffs should have had to spend by forcing plaintiffs to select a longer and more costly route for its pipeline, and that defendants' harassment of plaintiffs in connection with plaintiffs' drilling operations cost plaintiffs unnecessary additional money.

Plaintiffs allege that the combination or conspiracy and the attempt to monopolize on the part of the defendants originated with various agreements executed between Alcoa, Crown, and Appling. These agreements are summarized in plaintiffs' Exhibits 2A, 3A, 167A, and 25A. It is plaintiffs' contention that after these agreements were executed, defendants Alcoa and Crown and the alleged co-conspirator F. E. Appling used the rights they acquired in connection with these agreements, individually and joint-

ly, to effect such a combination or conspiracy to unduly restrain trade as is forbidden by Section 1 of the Sherman Antitrust Act, and to monopolize, or attempt to monopolize, or to conspire to monopolize as is forbidden under Section 2 of the Sherman Antitrust Act.

Another agreement plaintiffs allege to be a part of their case is the right-of-way agreement executed by F. E. Appling and Lumar Gas Pipeline Corporation, plaintiffs' Exhibit No. 83. Plaintiff's Exhibit 2A, 3A, 167A, and 25A were summaries dictated by counsel and the Court, summarizing joint operating agreements and amendments between Alcoa and Crown, agreements relating to transporting defendants' gas through Lavaca Pipeline Company's pipeline, as well as the agreements relating to assignments of leases between the parties, and the basic agreement between Alcoa and F. E. Appling concerning Mr. Appling's leasing to Alcoa of property that he owned in the area and his work for Alcoa in obtaining leases from other landowners and his retention or assignment to him of a royalty interest in connection with such leases. Plaintiffs' Exhibit No. 83 is an agreement between Mr. Appling and Lumar Gas Corporation in connection with which Mr. Appling granted to Lumar an easement to lay, construct, maintain, etc., a six inch pipeline for the transmission of natural gas over lands belonging to Mr. Appling in Jackson County, Texas. This agreement contained a provision obligating Lumar to accept for delivery and transportation, and to purchase or acquire for delivery and transportation, natural gas from wells situated in the area, which purchases were to be made only from the wells which were first approved and accepted by Mr. Appling; and if Lumar breached this particular covenant the right-of-way and easement would revert to Mr. Appling, together with the pipeline.

Plaintiffs further contend that as a result of the alleged conspiracy and combination resulting in the agreements

mentioned above, the defendants combined or conspired to boycott and concertedly refused to deal with plaintiffs Woods Exploration and Producing Company and Stanley C. Woods in that defendants refused to unitize any of plaintiffs' leases of various townsite lots with those of defendants in the Appling Field, or to buy or to transport plaintiffs' production from wells drilled by plaintiffs on these townsite lots; that defendants combined or conspired to control or attempt to control the terms and conditions of transporting plaintiffs' gas from the Appling Field for the purpose of blocking transportation of the gas from the Appling Field; and that F. E. Appling knew of the policy of defendants to prevent or restrict production from the townsite lots in the Appling Field, and pursuant to such knowledge and as a result of the rights he acquired in the right-of-way agreement, plaintiffs' Exhibit No. 83, he caused Lumar Gas Corporation to refuse to enter into a contract with Southeastern Pipe Line Company, and caused Lumar Gas Corporation to breach an agreement, if any, for transporting plaintiffs' gas over its line, and required Southeastern Pipeline Company to file condemnation proceedings for a right-of-way over F. E. Appling's land.

As pointed out above, plaintiff Southeastern Pipeline Company did construct its line and in connection therewith did obtain a right-of-way over Mr. Appling's land but had to resort to condemnation proceedings to do so.

With that factual background, we know turn to a consideration of what this Court considers to be its reasoning[7] and the law applicable thereto concerning this Court's conclusion that as a matter of law defendants are entitled to judgment.

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[7] In addition to those already stated in this Court's opinion in Woods Exp. & Prod. Co. v. Aluminum Co. of America, 284 F.Supp. 582 (S.D.Tex.1968).

At the outset of this case we are confronted with three questions: (1) What is the relevant market; (2) was there in this case monopoly power as defined by the Supreme Court, that is, power to control prices or exclude competition; and (3) was the monopoly power wilfully acquired and maintained or was it result of an historic accident?

A determination of the relevant market, "both as respects products and as concerns geographical area" needs to be made in actions for violation of section 2 of the Sherman Act. See Case-Swayne v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966). There is no question that natural gas is the relevant product market in the instant suit.

As to the relevant geographic market, this Court looks to the guidelines laid down by the Supreme Court in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). According to the *Brown Shoe* case, we must determine whether or not the Appling Field corresponds to the "commercial realities" of the industry and whether or not it is economically significant. It is true that the geographic market involved may be as small as a single-metropolitan area or even one individual businessman. See Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Considering the "commercial realities" of the oil and gas industry, however, this Court is convinced that the Appling Field does not constitute the relevant geographic market for natural gas in the area under consideration. All of the gas produced that was not used for the producer's own purposes was transported and sold in other areas. Additionally, due to the heavy regulations present in the natural gas industry,[8] neither Alcoa nor Crown, individually or jointly, or through F. E. Appling

[8] This Court has already discussed extensively the heavy regulation in the oil and gas industry. See Woods Exp. & Prod. Co. v. Aluminum Co. of America, 284 F.Supp. 582 (1968).

could establish any economic barriers which significantly impeded the entry of Woods or any other operators into the Appling Field. See Case-Swayne v. Sunkist Growers, *supra.*

The preceding point overlaps into the second question which concerns monopoly power. In this Court's opinion none of the alleged co-conspirators had the power to control prices or exclude competition in connection with the production of natural gas in the Appling Field. It is undisputed that Mr. Woods produced and marketed all of the gas that the Texas Railroad Commission permitted him to produce from the wells he drilled. The lack of monopoly power on the part of the defendants is apparent.

Plaintiffs rely heavily upon the case of Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), in which the Ninth Circuit draws a distinction between monopolization and attempts to monopolize. In attempts to monopolize, the Court rejected the view that probability of actual monopolization is an essential element of proof, where it stated:

> "Such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires — perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." Citing Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1906), and other cases.

The cases that *Lessig* relied on speak in terms of "dangerous probability" of the monopoly, etc., coming to pass. However, *Lessig* seems to go a step further. It holds that a finding of specific intent to monopolize is sufficient notwithstanding the probability of success. This Court refuses to take that additional step. There is no possibility, let alone probability, of monopolization in the Appling Field.

The *Lessig* case involves price fixing, which is far removed factually from the problem presented by this case. In addition, the circumstantial evidence in this record that would support a finding of specific intent on the part of the defendants is not persuasive to this Court.

In the final analysis, this Court must hold that the conduct of the defendants does not fit the definition of the offense condemned by section 2 of the Act. In addition, this Court holds that the Appling Field is not the relevant geographic market; that under the definition of the word "monopoly" these defendants as a matter of law lack the power to control prices or exclude competition; that whatever may have been placed within the control of the defendants in this case was the consequence of an historic accident (the discovery of the Appling Field); that their efforts to protect the natural gas they discovered by this historic accident was neither exclusionary, unfair, or predatory; and that they, and each of them, were not disempowered to defend their position fairly. This Court would again say that efforts before the Railroad Commission to prevent the drainage of gas from under the Appling Field by the small tract operators, including Woods, was fair. All of the other acts and conduct attempted to be proved by plaintiffs amounted to nothing more than conduct for which plaintiffs might have a cause of action under some tort theory.

Additionally, the agreements which plaintiffs contend brought about the monopoly and the combination in this case are the usual and customary types of agreements used in the oil and gas industry, that is, joint operating agreements, pooling agreements, unitization agreements, lease agreements, right-of-way agreements, and such agreements do not result in a limitation of the supply of gas in interstate commerce or any price fixing of gas. If the Sherman Antitrust Act were to be literally construed as plaintiffs contend,

it would condemn any type of joint operating agreement, or pooling agreement, or unitization agreement. In considering the "commercial realities" of this business, such would be an absurd result.[9]

Further, this Court is persuaded by the reasoning of the Supreme Court in the case of Appalachian Coals v. United States, 288 U.S. 344, 378, 53 S.Ct. 471, 77 L.Ed. 825 (1932). This case was an action brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and an attempted monopolization of a part of that commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act. The defendants, other than the Appalachian Coals, Inc., were 137 producers of bituminous coal in the Appalachian territory. These producers created an exclusive selling agency, Appalachian Coals, Inc., and all of the capital stock of that company was owned by the 137 producers in proportion to their production. The uniform contracts, separately made, of each of the defendant producers constituted the company as an exclusive agent for the sale of all coal which the producers mined out of the Appalachian territory. The government in the case contended that the plan adopted by these producers violated the Sherman Antitrust Act in that it eliminated competition between defendants themselves and also gave company power to substantially affect and control prices of bituminous coal in interstate commerce. Although factually the case is dissimilar, certainly the subject matter involved and the principles announced by the Supreme Court relating to

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[9] A discussion of this particular problem is found in an article by Hardwicke, Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools (1961); and an article by Searls, "Antitrust and Other Statutory Restrictions of Unit Agreements", Third Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation; and by Jacobs, Unit Operation of Oil and Fields, 57 Yale L.J. 1207 (1948).

that subject matter seem appropriately similar to the instant case. What the Supreme Court said about the Sherman Antitrust Act, what it was designed to do, and the necessity of looking at the particular industry involved support this Court's reasoning of the application of the Sherman Antitrust Act to the oil and gas industry and the activities of the defendants in the instant case. The Supreme Court reversed the trial court which had granted the injunction sought by the government, holding that the plan violated the Sherman Antitrust Act.

> "There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Antitrust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. * * * The decisions establish, said this Court in Nash v. United States, 229 U.S. 373, 376, 57 L.Ed. 1232, 1235, 33 S.Ct. 780, 'that only such contracts and combinations are within the act, as by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' (Citing numerous cases.) In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realties must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' * * * The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, * * * in relation to market prices and other

matters affecting the public interest in interstate commerce in bituminous coal."

Finally, this opinion and the Court's action in this case must be taken together with this Court's opinion and reasoning in Woods Exploration & Producing Co. et al., v. Aluminum Company of America et al., supra. Simply stated, the activities of the defendants in this case, when considered in conjunction with the discovery of, the production of, the transportation of, and the marketing of oil and gas, do not lend themselves to a cause of action under the Sherman Antitrust Act. There is no price fixing or attempt at price fixing involved. The product dealt with is one that is heavily regulated both in this case by the State of Texas and, with respect to marketing and price, by the Federal Power Commission. Efforts on the part of these agencies to protect the public in the conservation of this resource is necessary and, of course, monopolistic in a sense.

It would seem to this Court that courts should be reluctant to hold that the Sherman Antitrust Act applies to the type of agreements used in this case. They are the same type of agreements used in almost all activities in the oil and gas field, where the development of the product is regulated and the output is controlled, and the rights of the public are well protected. The ultimate recovery of the product is necessarily controlled, but not for the purpose of restraining trade or reducing competition of a character or a type contemplated by the antitrust laws.[10]

This Court will grant defendants' motion for judgment notwithstanding the verdict as to the jury's answer to Question No. Two. Defendants' attorneys will prepare an appropriate judgment, submit same to plaintiffs' attorneys for approval as to form, and the Court will immediately sign and enter same.

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[10] See Hardwicke, *supra*.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 28763 and 29487

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,

Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA, ET. AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(January 5, 1971)

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge: This battle-scarred antitrust case and its antecedents, both lineal and collateral, have been in litigation without surcease, armistice, or truce since the early 1960's. The war today continues on two fronts — federal and state. Preserving for later the intimate factual details revealed in the myriad documents and testimony adduced below, we now sketch in the main historical contours of the present dispute.

The trouble among the parties centers around their activities in the Appling Natural Gas Field in Jackson and Calhoun Counties, Texas. Defendants, Aluminum Company of America ((Alcoa), Crown Central Petroleum Corporation (Crown), Lavaca Pipe Line Company (Lavaca), and alleged co-conspirators, F. E. Appling (Appling), Carl E.

Siegesmund (now Pocantico Oil & Gas Corporation), and Houston Pipe Line Company (Houston), control nearly 90% of the 4,000 acre surface of the Appling Field. Plaintiffs, Woods Exploration & Producing Company (Woods Exploration), Stanley C. Woods (Woods), and Southeastern Pipeline Company (Southeastern), have in combination an interest in various small tracts in the Field which comprise a much smaller percentage of the total acreage. Competition over the extraction of natural gas from this common field is at the heart of the dispute.

Production from the Appling Field is regulated by the Texas Railroad Commission, and its regulatory activities have given birth to several suits between the parties with regard to Commission production allowables. *Railroad Commission* v. *Aluminum Co. of America,* Tex. 1964, 380 S.W.2d rev'g Tex. Civ. App. 1963, 368 S.W.2d 818, *Railroad Commission* v. *Woods Exploration & Producing Co.,* Tex. 1966, 405 S.W.2d 313. In 1962 plaintiffs filed a state antitrust action alleging a combination or conspiracy on the part of defendants to eliminate or thwart plaintiffs from competing in the production of gas from the Appling Field. Shortly thereafter, in December 1962, plaintiffs filed the instant federal antitrust suit against defendants seeking injunctive relief and treble damages for alleged violations of the Sherman and Clayton Acts, 15 U.S.C.A. §§ 1, 2, 15, 26. By their complaint plaintiffs charged that defendants and their alleged co-conspirators had restrained trade in the production and marketing of natural gas from the Appling Field, 15 U.S.C.A. § 1,[1] and that defendants and their al-

[1] 15 U.S.C.A. § 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

leged co-conspirators had monopolized, attempted to monopolize, or combined and conspired to monopolize the production and marketing of gas from the Field, 15 U.S.C.A. § 2.[2] Acts charged in furtherance of the allegations in both the state and federal suits were of two basic types: (1) the filing of false nomination forecasts by defendants with the Texas Railroad Commission so as to reduce plaintiffs' production allowables; and (2) the thwarting of plaintiffs' gas production by defendants' refusal to deal, and by defendants' harassment and interference with plaintiffs' operations. Defendants responded in the instant suit with a motion to dismiss for failure to state a claim, and, in the alternative, a motion for summary judgment. Both motions were overruled by then District Judge Ingraham, *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, S.D. Tex. 1963, 36 F.R.D. 107. Several months later the Texas Supreme Court held that plaintiffs' state suit allegations set forth a cause of action under state law and ordered the case to trial. *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343. That case is still pending.

The present issues arose after the transferral of the federal action to the court of District Judge Singleton as a docket equalization measure in 1966. In *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, S.D. Tex. 1968, 284 F.Supp. 582, Judge Singleton, in a carefully written opinion, granted summary judgment for defend-

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[2] 15 U.S.C.A. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

ants with respect to plaintiffs' allegation of damages due to the filing of false nomination forecasts. The other allegations then proceeded to trial and were submitted to a jury upon special interrogatories. Although finding no restraint of trade in violation of section 1 of the Sherman Act, the jury found that defendants had monopolized, attempting to monopolize, or conspired to monopolize in violation of section 2, and awarded damages of $142,759 to Southeastern, and $500 to Woods Exploration. That verdict is reproduced in the margin.[3]

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[3] VERDICT

In connection with your deliberations of the following questions, you are instructed that plaintiffs have the burden of proof.

QUESTION NO. ONE

Did defendants Alcoa and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question "Yes" or "No."

Answer: No.

QUESTION NO. TWO

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "No," then you need not answer any of the following questions, but if you have answered Question No. One "Yes" or Question No. Two "Yes," or answered both Questions One and Two "Yes," then you will answer the following questions.

If you have answered Question Nos. One and Two "Yes,"

or either of them "Yes," then you will answer the following question:

QUESTION NO. THREE

3(a) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monoplize inquired abut in Questions Nos. One and Two, did Alcoa and Crown refuse to deal with Stanley C. Woods, individually, or Wods Exploration and Producing Company?

Answer this question either "Yes" or "No."

Answer Yes.

3(b) As a result of such illegal contract, combination, or conspiracy, or a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown employ the surveying patrnership of Johnston & Ford to make an incorrect survey of the Caranchua townsite property.

Answer this question either "Yes" or "No."

Answer: No.

3(c) As a result of such illegal contract, combination or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown harass or interfere with the operation of Woods Exploration & Producing Company in the drilling of wells on the townsite lots in the Appling Field.

Answer this question either "Yes" or "No."

Answer: Yes.

QUESTION NO. FOUR

Did Fred A. Wolcott sign plaintiff's Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: No.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No" then you will answer the following question:

QUESTION NO. FIVE

As a result of such illegal contract, comibnation, or conspiracy, or a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent Fred Wolcott from signing plaintiffs' Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "Yes," of either of them "Yes," and if you have answered Question No. Four "No", then you will answer the following question:

QUESTION NO. SIX

As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent any other authorized representative of Lumar Gas Corporation, from entering into an agreement with plaintiffs Southeastern Pipeline Company, Stanley C. Woods, or Woods Exploration & Producing Company relating to the transportation of plaintiffs' gas from the Appling Field?

Answer this question either "Yes" or "No".

Answer: No.

QUESTION NO. SEVEN

What sum of money, if any, would fairly and reasonably compensate plaintiff Southeastern Pipeline Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy, or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Questions Nos. 4, 5, and 6, "No." then in connection with your answer to this Question No. Seven relating to damages, if any, you are not to take into consideration in connection with your deliberations of damages, if any, to Southeastern Pipeline Company, any testimony or evidence relating to the building by Southeastern Pipeline Company of a gas transmission pipeline from the Appling Field to con-

nect with the Tennessee Gas Transmission line, or the cost of any such line.

Answer this Question No. Seven by stating the amount in dollars and cents.

Answer: $142,759.00

"1) Loss of pipe purchased & not used = $4,059."

"2) 6 wks. loss production on 16,000 mcf/day at 11¢/mfc gross ÷ 2 for net = $79,200*

"3) Loss of building 2nd pipeline $99,100."

*At the time the verdict was accepted by the court the foreman of the jury clarified that the figure should be $39,600. (Tr. 3343-44).

QUESTION NO. EIGHT

What sum of money, if any, would fairly and reasonably compensate Woods Exploration & Producing Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any were proximately caused by the illegal combination or conspiracy or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Question 3(a) "No," then in connection with your deliberations concerning this question No. Eight, you will not take into consideration any testimony or evidence relating to the failure on the pa of Alcoa and Crown to deal with Stanley C. Woods, individually, or Woods Exploration and Producing Company concerning the transportation of gas out of the Appling Field.

If you have answered Question 3(b) "No", then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to an incorrect survey or conflict in surveys in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

If you have answered Question 3(c) "No." then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to any harassment or interference with the operations of Woods Exploration & Producing Company in the Appling Field in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

You will answer this Question No. Eight by stating the amount in dollars and cents.

Answer: $500.00.

Finding this result unsupported by the evidence, the court below granted defendants' motion for judgment notwithstanding the verdict. Woods Exploration & Producing Co. v. Aluminum Company of America, S.D. Tex. 1969, 304 F.Supp. 845. Moreover, the court also issued an injunction enjoining plaintiffs from prosecuting their action then pending in the state court. The present appeal is a consolidation of plaintiffs' separate appeals from the decisions below. Disagreeing with the district court, we reverse and remand in part. In order to facilitate our explanation of our ruling, we consider in separate sections the various grounds raised on appeal.

I

Plaintiffs' first specification of error involves the partial summary judgment granted by the court below. In their complaint plaintiffs sought to recover as damages the loss of production from their wells in the Appling Field which had been occasioned by the entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' well sat levels lower than plaintiffs thought they should have received. Liability was alleged against defendants on the ground that the Railroad Commission orders had been based in part on false nomination forecasts and reports filed by defendants with the Commission. While the trial court found that it was "clear that there are disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false nominations," it granted summary judgment for defendants, since it found that "even if plaintiffs' allegations in these respects are true, plaintiffs would still not be entitled to recover damages for these activities." We disagree.

Free competition among well producers is limited by Texas law in order to prevent waste. The allowable produc-

tion which each well in the Appling Field is permitted to produce is set monthly by order of the Texas Railroad Commission. The Commission is mandated to limit total production from the field to the reasonable market demand for gas made upon the field. See Tex. Rev. Civ. Stat. Ann. art. 6008 § 3(h). Each producing well is entitled to its fair share of the total allowable field production, an amount roughly proportional to the volume of gas in place under the tract on which the well is drilled. *Id.* § 12; see *Brown* v. *Humble Oil & Ref. Co.*, 1935, 83 S.W. 2d 935, 944.

While no statutory provision prescribes the procedure by which market demand is to be determined, the Commission has usually followed the procedures described in its Statewide Rule 31. Under that rule, market demand is determined primarily on the basis of Producer's Forecasts filed with the Commission by operators having wells in the field. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month. The nominations are totaled and, if the Commission concludes that their total accurately reflects market demand, the total becomes the field allowable. If the Commission disagrees with the forecasts, it is empowered to consider other factors, such as average production for the previous twelve months or nominations filed by purchasers of gas. See *Railroad Commission* v. *Woods Exploration & Producing Co.*, Tex. 1966, 405 S.W.2d 313.

After determining the total allowable for the field, the Commission has followed the practice of calculating the allowable for each well by application of a one-third — two-thirds proration formula. One-third of the field allowable is divided among the wells in the proportion to which the surface acreage attached to the well bears to the combined surface acreage of all wells in the field. Two-thirds of the field allowable is divided among the wells in the

proportion that each well bears to the total number of wells. This heavy emphasis upon the well factor has meant that producers with wells on small tracts have been permitted to extract far more gas than their acreage would justify. This effect is compounded by the fact that many wells on large tracts, although producing at full capacity, have been unable to produce the allowable assigned to them under the formula. As a result the amount they have been unable to produce has been allocated by the Commission to the small-tract wells not already producing at full capacity. Because of its inequitable effect on large tract owners, the one-third — two-thirds formula was declared invalid by the Texas Supreme Court. *Atlantic Ref. Co.* v. *Railroad Commission,* Tex. 1962, 346 S.W.2d 801. However, the formula retains its vitality in the Appling Field because of *Railroad Commission* v. *Aluminum Company of America,* Tex. 1964, 380 S.W.2d 599. The Texas Supreme Court there held that the formula could not be invalidated with respect to the Appling Field since large-tract owners were guilty of laches in attacking it. Although the court recognized the inequalities in the formula, it found this defect outweighed because "stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large."

It was in this context that plaintiffs alleged that defendants attempted to subvert the effects of the proration formula by filing false production forecasts to reduce the total field allowable. The trial court held that even if this allegation were true there would be no liability on the ground that the combined action by defendants to influence the Railroad Commission allowables did not violate the Sherman Act. It held that "any injury which *any* producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Com-

mission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State."

The trial court's theory rests in part on *Parker* v. *Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, where the Supreme Court held that a state agricultural marketing program was exempt from the Sherman Act, even though the program would have violated the Act if effected by a combination of private parties. Stressing that the program had been established under state legislation and was administered by a group appointed by the Governor and confirmed by the State Senate, the Court found that such direct governmental involvement was outside the pale of the proscriptions of the antitrust acts.

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-51.

See also *United States* v. *Rock Royal Cooperative*, 1938, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. Defendants assert that since their nominations become a part of the Commission's final production allowable orders, plaintiffs alleged injury is solely the result of state action. Defendants place principal reliance on our decision in *Okefenokee Rural Elec. Membership Corp.* v. *Florida Power & Light Co.*, 5 Cir. 1954, 214 F.2d 413. In Okefenokee the plaintiff brought an antitrust suit against Florida Light & Power Company and the City of Jacksonville, Florida, alleging that defendants

had unlawfully conspired to exercise exclusive control over the territory into which plaintiff was seeking to extend electric power lines. The only feasible route along which a new power line could be built paralleled Federal Highway 17. Plaintiff applied to the Florida State Road Department for permission to construct a line along the route. In order to defeat plaintiff's application, defendants constructed a "spite line" along the same route. Despite the fact that this line served no purpose other than to block plaintiff's application and could serve only two persons, defendants made a misleading argument before the Road Department that a line had already been constructed and that no new line should be built. Subsequently, the Road Department denied plaintiff's application. The district court dismissed the complaint for failure to state a claim, and this court affirmed, stating:

> "In brief, all of the damages averred in the complaint and all that are shown to be probable have been suffered or will accrue from the denial of the right to use this 'only feasible route,' which in turn results from the denial of a permit by the State Road Department of Florida, and from the rules and regulations governing the use of County roads by the Board of County Commissioners of Duval County, Florida. It is not claimed that either the State Road Department or the Board of County Commissioners was acting beyond its respective jurisdiction, or that for any other reason its action was invalid.
>
> "As so forcibly illustrated in Keogh v. Chicago & N. Y. Ry. Co., 260 U.S. 156, 163, 43 S. Ct. 47, 49, 67 L.Ed.183, 'Injury implies violation of a legal right.' The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, not

withstanding it may have been irreparably damaged." 214 F.2d at 418.

We think *Okefenokee* is distinguishable and does not compel affirmance of the judgment below. It is true that both *Okefenokee* and the instant case involve state participation. That proposition however, only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject "the facile conclusion that action by any public official automatically confers exemption." *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 1 Cir. 1970, 424 F.2d 25, 30. In *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 4 Cir. 1959, 263 F.2d 502, 509, the court stated:

> "The teaching of Parker v. Brown is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials. Rice v. Chicago Board of Trade, 331 U.S. 247, 253, note 4, 67 S.Ct. 1160, 91 L.Ed. 1468; United States v. Underwriters Association, 322 U.S. 533, 562, 64 S.Ct. 1162, 88 L.Ed. 1440; Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035. See also note in 95 Pa.L.Rev. 223, 229. Both such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."

See also Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 Mich.L.Rev. 333, 340-43 (1967).

The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anti-competitive consequence is truly the action of the state. Bearing this in mind, we think that the exaggerated and misleading argument made by defendants in *Okefenokee* is fundamentally different from the filing of false factual data with regard to gas production. While in *Okefenokee* there was state action in the sense that the state can be said to have intended the resulting final order which adversely affected plaintiffs, the same cannot be said of the consequences of the Railroad Commission order at issue here. Phrasing the relevant criteria in other terms, the court in *Whitten* said:

> "Unlike Paddock, we do not read *Continental Ore* to mean that any action by a Canadian public official would have resulted in exemption. An anti-competitive practice may receive only the most cursory inspection by public officials, *see* Woods Exploration Co. v. Alcoa, 36 F.R.D. 107 (S.D. Texas 1963), or public officials may approve conduct without consideration or awareness of its anti-competitive aspects. *Cf.* Angle v. Chicago, St. Paul, Minneapolis and Omaha Rwy. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893). The issue in such cases is not whether the action was in form 'governmental,' but the real decision makers were public officials or private business. *See* American Bar Association, 1955-1968 Antitrust Developments, 211-12 (1968)." 424 F.2d at 33, n. 8.

Thus, while in *Okefenokee* defendants presented misleading arguments, the pleadings did not allege falsification of facts. Further, the misstatements that were made were readily verifiable. Consequently, there was no allegation that the governing authority's decision to award the route to defendants was premised upon false information. The

adverse result with regard to plaintiffs can therefore be said to have flowed from state rather than private action. Conversely, in the case at hand there is an allegation that the Commission's production allowable order rested upon false facts adduced by defendants. There was, moreover, no opportunity for meaningful supervision or verification. Because of the amount and character of nomination predictions, the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually in the exclusive control of those producers, so the final order of the Commission often must accept the nomination at face value. Hence, defendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts. Indeed, plaintiffs' basic claim is that the applicable production allowable formula which the state would have intended to utilize was subverted to the injury of plaintiffs by defendants' filing of false nomination forecasts. The situation is analogous to the filing of fraudulent statements with the Patent Office, which has been held to be evidence of an antitrust violation. *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 1965, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247. See generally Costilo, *supra*, at 348-50.

Our case is also similar to *Continental Ore Oil* v. *Union Carbide & Carbon Corp.*, 1962, 370 690, 82 S.Ct. 1404, 8 L.Ed.2d 777, where the Supreme Court held that defendants' anticompetitive activities were not protected under the *Parker* rationale. There, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. In defense of a private treble damage action, defendants asserted that the purchasing agent was acting as an administrator of the

Canadian Government and that the conduct was therefore privileged under *Parker*. The Supreme Court, stressing that there was no evidence that the Canadian Government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. Again, in *UMW v. Pennington*, 1965, 381 U.S. 657, 671, 85 S.Ct. 1585, 14 L.Ed.2d 626, the Court reiterated this rationale and distinguished *Continental Ore* on the ground that in that case there had been no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium. . . ."

Similarly, the Texas regulatory scheme at issue in this case does not sanction defendants' alleged conduct. While the scheme clearly provides for inhibitions upon competitive production, it is the Railroad Commission which is empowered to set production allowables. In doing so, the Commission of necessity must rely in part on nomination forecasts and reports filed by producers. But the discretion accorded the producers is circumscribed; their forecasts must be based on the volume of gas which each expects to be able to market from his wells the following month. Defendants were not clothed with discretion to subvert this scheme by filing unjustifiably low forecasts in order to reduce the production allowables. While state remedies may exist to correct this conduct, such activities also may state a cause of action under the federal antitrust laws.[4]

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[4] The Railroad Commission scheme itself provides that "nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly statutes of this State, and that no provision of this Act shall in any manner directly or indirectly authorize a violation of such anti-trust and/or monopoly statutes. . . ." Tex.Rev.Civ.Stat.Ann. art 6049d, § 13. *Cf.* Woods Exploration & Producing Co. v. Aluminum Company of America, Tex. 1964, 382 S.W.2d 343.

Even if the conduct of defendants cannot be denominated state action and thus immunized under *Parker,* defendants assert that it is immunized by the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 1960, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, and *UMW* v. *Pennington, supra,* which hold that joint efforts to influence public officials in the passage of laws are beyond the scope of the antitrust laws.

In *Noerr* the Supreme Court held that a railroad association's efforts to secure state legislation harmful to truckers who competed with the railroads were exempt from the Sherman Act, even though deceptive and intended to reduce competition. The decision in *Noerr* is premised on the principle that valid legislative or executive action which results in the restraint or monopolization of trade does not violate the Sherman Act. See *Parker* v. *Brown, supra.* Consequently, attempts to influence the legislative and executive branches must also be excluded from the Sherman Act because prohibiting such activity

> "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 137.

Basic to *Noerr* is a belief that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, an enactment which is itself a political decision. For the political process to be effective there must be freedom of access, regardless of motive, to ensure

the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." 365 U.S. at 139. See generally, Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847 (1968). Where these political considerations are absent the *Noerr* doctrine is inapplicable. See Note, *The Brakes Fail on the Noerr Doctrine*, 57 Calif. L. Rev. 518 (1969). The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and reqiure the same result. In *Trucking Unlimited* v. *California Motor Transport Co.*, 9 Cir. [No. 22,462, October 5, 1970] the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policymaking function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies. Similarly, in the instant case there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense and thus participation in those rule-making proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity

in their attempt to undermine its efficacy for anti-competitive purposes. In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 424 F.2d at 32, the court reached a similar conclusion with regard to a different subject matter:

> "But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By 'enforcement of laws' we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to us in a swimming pool gutter."

When Judge Ingraham below denied defendants' motion for summary judgment on the pleadings, he recognized the inapplicability of *Noerr* to the facts of this case:

> "As a second ground for dismissal the defendants argue that the allegedly false nominations were made in an attempt to influence governmental action, and therefore, as a matter of law, cannot be a violation of the antitrust legistlation. The case of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1960), is deemed to be controlling. It was charged in that suit that the defendant railroads had conspired, through a concerted publicity campaign, to obtain the passage of legislation which was detrimental to the interests of the trucking business. The court found no basis for imputing to the Sherman Act a purpose to regulate *political* activity, and held that the railroads' activities were outside the ban of the Act 'at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.' 365 U.S. at 138, 81 S.Ct. at 530.
>
> "First, is the conduct complained of in the instant case political in nature? If the defendants were en-

> joined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behaivor. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purpose of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr." 36 F.R.D. at 111-12.

See also *Woods Exploration & Producting Co.* v. *Aluminum Company of America,* Tex. 1964, 382 S.W.2d 343.

Defendants and the court below, however, argue that the decision in *Pennington,* decided subsequent to Judge Ingraham's opinion, has extended the *Noerr* immunity. We disagree. In *Whitten* the court faced a similar contention and found that *Pennington* posited no extension of the *Noerr* rationale:

> "*Noerr* was followed by *Pennington,* a case involving an effort by large mine operators and union officials to persuade the Secretary of Labor to prescribe higher minimum wages for companies selling coal to the TVA on long-term contracts. This effort at persuasion would seem to fall well within the *Noerr* immunity for attempts to influence the enforcement of laws. The Walsh-Healy Act, 41 U.S.C.A. § 35 *et seq.*, conferred considerable discretion on the Secretary of Labor to set wage levels in the public interest, and required the Secretary to observe the strictures of the Administrative Procedure Act, including notice, public hearing, and judicial review, in making wage rulings. 41 U.S.C. §§ 35(b), 43a; Costilo, AntiTrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich.L.Rev. 333, 344-345 (1967). Nevertheless, the trial court instructed the jury that efforts to influence the Secretary were illegal

if part of a broader conspiracy to drive small mine-owners from business. Pennington v. United Mine Workers, 325 F.2d 804, 817 (6th Cir. 1963). The Court of Appeals took an even more restrictive view, holding that *Noerr* shielded only good-faith attempts to influence public officials, 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' 325 F.2d at 817. In rejecting these restrictive views of *Noerr,* the Supreme Court observed:

> 'Joint efforts to influence public officials do not violate the antitrust laws even through intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.' 381 U.S. 657 at 670, 85 S.Ct. 1585 at 1593, 14 L.Ed.2d 626.

> "Paddock [the plaintiff] seizes on this statement to buttress its position that efforts to influence any public official are exempt. In context, however, the Court's emphasis is not on the role of the public officials involved, but rather on the irrelevance of intent or conspiracy in applying the *Noerr* doctrine." 424 F.2d at 32-33 (footnote omitted).

We therefore find *Noerr-Pennington* inapplicable to the alleged filing of false nominations by defendants because this conduct was not action designed to influence policy, which is all the *Noerr-Pennington* rule seeks to protect. In light of this determination we hold that the abuse of the administrative process here alleged does not justify antitrust immunity. Consequently, we reverse the grant of summary judgment and remand the issue for an evidentiary determination of whether or not defendants in fact filed false nominations, and, if so, what damages plaintiffs sustained therefrom.

II.

Plaintiffs' next specification of error is that the trial court erred in granting a judgment notwithstanding the verdict for plaintiffs on the issue concerning monopolization. The plaintiffs had contended that the defendants violated the Sherman and Clayton Acts by refusing to deal with the plaintiffs regarding production and transportation of gas produced from plaintiffs' wells and by otherwise interfering with the plaintiffs' operations in the Appling Field. After the submission of special issues the trial court granted judgment for the defendants notwithstanding the following verdict of the jury:

> *"Question No. Two*
>
> Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?
>
> Answer: Yes."

A. The Statute of Limitations

Defendants first argue, however, that regardless of any possible substantive error in granting the judgment n.o.v., plaintiffs are procedurally barred from recovery upon the affirmative answer given by the jury to the second interrogatory. Appellees entreat us to apply the applicable four-year statute of limitations[5] as a lethal blow to appellants' recovery.

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[5] 15 U.S.C.A. § 15b provides:

> "Any action to enforce any cause of action under section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The statute applies, appellees contend, because the fact added in the 1965-1968 amended complaints — emphasizing section 2 monopolization — cannot relate back to the original complaint filed in 1962 — emphasizing false nominations. We scorn this approach, which would make us antediluvian in construing Fed. R. Civ. P. 15(c).[6] Chief Judge Brown has articulated for this court the liberality with which we should approach Rule 15(c):

> "The starting point for our analysis is F.R. Civ.P. 15(c), which deals with the relation back of pleading amendments. The Rule provides essentially that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment will relate back to the date of the original pleading. The doctrine of relation back under Rule 15(c) is liberally applied today in the Federal Courts, especially if no disadvantage will accrue to the opposing party. 1A Barron & Holtzoff, Federal Practice and Procedure § 448 (Wright ed. 1960). Rule 15(c) is 'based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description

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[6] That rule provides:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

of the rights sought to be enforced.' 3 Moore, Federal Practice 15.15[2], at 1021.

"Of course, we are committed to the proposition that leave to amend should be given freely when justice requires. Longbottom v. Swaby, 5 Cir. 1968, 397 F.2d 45; Lone Star Motor Import, Inc. v. Citroen Cars Corp., 5 Cir. 1961, 288 F.2d 69.

"Clearly notice is the critical element involved in Rule 15(c) determinations. Cf. Tiller v. Atlantic Coast Line R.R. Co., 1945, 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465; New York Cent. & H.R.R. Co. v. Kinney, 1922, 260 U.S. 340, 43 S.Ct. 122, 67 L.Ed. 294. See generally 1A Barron & Holtzoff, Federal Practice and Procedure § 448 (Wright ed. 1960). This Court, too, has previously emphasized this. "The Federal rule on the "relation back" of amendments to pleadings, as embodied in Federal Rule 15(c) is permissive. As long as the amended complaint refers to the same transaction or occurrence that formed the basis for the original complaint and the defendant was put on notice of the claim by the first complaint, there will be no bar to amendment; even new defendants and new theories of recovery will be allowed.' Travelers Ins. Co. v. Brown, 5 Cir., 1964, 338 F.2d 229, 234." *Williams* v. *United States,* 5 Cir. 1968, 405 F.2d 234, 236-37 (footnote omitted).

This liberality is particularly persuasive in antitrust suits where there is ample opportunity for discovery and other pretrial procedures. Cf. *Western Geophysical Co. of America* v. *Bolt Assoc., Inc.,* D. Conn. 1969, 305 F.Supp. 1248, 1249 (" . . antitrust pleadings need not be in particular technical form as long as they present 'a short and plain statement of the claim showing that the pleader is entitled to relief' as required by Fed. R. Civ. P. 8. This is particularly true in a case such as this where there have already been several pre-trial conferences and extensive discovery has been taken"). The court below allowed the amendments,

and we think that this ruling was well within its discretion. A fair reading of the initial pleadings clearly shows that the plaintiffs, in addition to their false nomination claim, were alleging that the defendants monopolized the extraction of gas from the Appling Field. Appellees were neither surprised nor prejudiced, as their extensive fact-ferreting and myriad defense marshalling testifies. The compendious record in this case justifies our conclusion that no one was litigating in darkness. We therefore turn to the factual background necessary to assess the validity of the judgment n.o.v.

B. Factual Background

In 1949 defendants Alcoa and Crown entered into joint operating agreements covering an area of interest located within the territory now known as the Appling Field, a substantial portion of which was owned in fee by F. E. Appling. After confirming the desirability of the area as a drilling prospect, Alcoa obtained leases from Appling and engaged him to obtain oil and gas leases from the other landowners in the field. Subsequently, Carl Siegesmund (now Pocantico Oil Corporation) entered into the joint agreement for development of the field. By 1957 these parties owned or held leases on approximately 90% of the 4,000 acre surface of the Appling Field.

Alcoa caused its wholly-owned subsidiary Lavaca to construct a pipeline into the Appling Field to transport the gas produced from the field to Alcoa's aluminum smelter at Point Comfort, Texas. On July 14, 1955, Alcoa, Crown, and Pocantico entered into a gas marketing agreement with Houston Pipe Line Company. This company purchased gas produced in the Appling Field owned by Alcoa, Crown, and Pocantico, accepted delivery at Point Comfort, and transported a portion of such gas to Monsanto Chemical Company in Texas City and Chocolate Bayou, Texas.

In 1959 plaintiff Wood became interested in the Appling Field, especially that portion known as the Carancahua Beach Townsite located in Calhoun County, which generally consisted of small, vacant town lots. The acreage of these lots amount to considerably less than one-half of one percent of the entire acreage of the Appling Field. Around 1960 plaintiff Woods Exploration, the stock of which is wholly owned by plaintiff Woods, began leasing up these small lots. After defendants refused to unitize or pool drilling operations, plaintiffs commenced their own drilling, and completed nine or ten gas wells. Woods and Woods Exploration, in order to sell or transport their gas production from the wells, attempted to utilize the pipeline of Alcoa's subsidiary, Lavaca, the only available outlet. The evidence shows and the jury found that these efforts were unsuccessful largely because Lavaca refused to deal with plaintiffs. Plaintiffs then formed Southeastern Pipeline Company to transport the gas. Subsequently, Lumar Gas Pipeline Corporation (Lumar) and Appling executed a right-of-way agreement whereby Lumar was enabled to construct a pipeline for the transmission of natural gas over lands belonging to Appling. This agreement contained a provision obligating Lumar to accept for delivery and transportation, and to purchase or acquire for delivery or transportation, natural gas from wells situted in the area, which purchases were to be made only from the wells which were first approved and accepted by Appling. When Woods, Woods Exploration, and Southeastern attempted to utilize the Lumar Pipeline, they were rebuffed. In particular, Lumar, relying on its obligation to Appling, refused to execute a contract with Southeastern which had been in the process of negotiation. Moreover, during this period Appling refused to grant Southeastern a pipeline easement across his land unless an overriding royalty was paid on any gas transported through the pipeline across his land. South-

eastern eventually was forced to file condemnation proceedings for a right-of-way over Appling's land and to construct its own line to transport gas from the Woods' wells in the Appling Field to the pipeline of Tennessee Gas (now Tenneco). Production and transportation of gas from the Woods' wells began on January 1, 1961. As gas was produced it was sold to Southeastern, which transported the gas to the Tenneco line, which further transmitted the gas to Southeastern's customer, Bayou Hydrocarbons Company in Houston, Texas.

Plaintiffs' basic allegations arising out of these facts were that defendants violated the antitrust laws by refusing to deal with plaintiffs so that plaintiffs could drill for, transport, and market their gas, and by harassing plaintiffs' efforts to drill and complete their wells. Thus, plaintiffs allege that they were injured by (1) defendants' refusal to transport plaintiffs' gas through the Lavaca pipeline, (2) defendants' conspiracy with Appling to prevent either the transportation of gas through the Lumar pipeline or the grant of a reasonable pipeline easement to Southeastern; (3) defendants' refusal to unitize or pool; and (4) defendants' harassment of plaintiffs in connection with plaintiffs' drilling operations.

After the jury verdict for plaintiff's, the court granted defendants' motion for judgment n.o.v. It reasoned as follows:

> "In the final analysis, this Court must hold that the conduct of the defendants does not fit the definition of of the offense condemned by section 2 of the Act. In addition, this Court holds that the Appling Field is not the relevant geographic market; that under the definition of the word "monopoly" these defendants as a matter of law lack the power to control prices or exclude competition; that whatever may have been

placed within the control of the defendants in this case was the consequence of an historic accident (the discovery of the Appling Field); that their efforts to protect the natural gas they discovered by this historic accident was neither exclusionary, unfair, or predatory; and that they, and each of them, were not disempowered to defend their position fairly. This Court would again say that efforts before the Railroad Commission to prevent the drainage of gas from under the Appling Field by the small tract operators, including Woods, was fair. All of the other acts and conduct attempted to be proved by plaintiffs amounted to nothing more than conduct for which plaintiffs might have a cause of action under some tort theory.

Additionally, the agreements which plaintiffs contend brought about the monopoly and the combination in this case are the usual and customary types of agreements used in the oil and gas industry, that is, joint operating agreements, pooling agreements, unitization agreements, lease agreements, right-of-way agreements, and such agreements do not result in a limitation of the supply of gas in interstate commerce or any price fixing of gas. If the Sherman Antitrust Act were to be literally construed as plaintiffs contend, it would condemn any type of joint operating agreement, or pooling agreement, or unitization agreement. In considering the "commercial realities" of this business, such would be an absurd result.

* * * *

Finally, this opinion and the Court's action in this case must be taken together with this Court's opinion and reasoning in Woods Exploration & Producing Co. et al., v. Aluminum Company of America et al., supra. Simply stated, the activities of the defendants in this case, when considered in conjunction with the discovery of, the production of, the transportation of, and the marketing of oil and gas, do not lend themselves to a cause of action under the Sherman Antitrust Act. There is no price fixing or attempt at price fixing in-

volved. The product dealt with is one that is heavily regulated both in this case by the State of Texas and, with respect to marketing and price, by the Federal Power Commission. Efforts on the part of these agencies to protect the public in the conservation of this resource is necessary and, of course, monopolistic in a sense.

It would seem to this Court that courts should be reluctant to hold that the Sherman Antitrust Act applies to the type of agreements used in this case. They are the same type of agreements used in almost all activities in the oil and gas field, where the development of the product is regulated and the output is controlled, and the rights of the public are well protected. The ultimate recovery of the product is necessarily controlled, but not for the purpose of restraining trade or reducing competition of a character or a type contemplated by the antitrust laws." 304 F.Supp at 850-52 (footnotes omitted).

C. Possible Exemption from Antitrust Laws

The district court's opinion seemed to imply that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws. We cannot agree with this determination of the trial court. True the production, gathering, and transportation of natural gas in the Appling Field is subject to regulation by the Texas Railroad Commission. See, e.g., Tex. Rev. Civ. Stat. art. 6008; 15 U.S.C.A. § 717 (b). The Commission is empowered to regulate competition in order to mitigate its abuse. But this state regulation does not mean that there is no room for antitrust policies to operate. Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated. As the Supreme Court has reminded us, "immunity from antitrust laws 'is not lightly implied.'" *United States* v. *First City Nat'l Bank,*

1967, 386 U.S. 361, 368, 87 S.Ct. 1088, 18 L.Ed.2d 151, quoting *California* v. *FPC*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54. We therefore think it incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive. As Judge Wright expressed the matter in *Northern Nat. Gas Co.* v. *FPC*, D.C. Cir. 1968, 399 F.2d 953, 959:

> "Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same — to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other."

Therefore, while we cannot hold that actions taken pursuant to Commission regulations violate the antitrust laws, we can hold that actions taken to subvert the Commission scheme for anti-competitive purposes are subject to strictures of the antitrust laws. See Tex. Rev. Civ. Stat. Ann. art. 6049d, § 13; *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343; cf. *Silver* v. *New York Stock Exchange*, 1963, 373 U. S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389. Considering this distinction, we think that plaintiffs have alleged conduct which is not immunized solely because of regulation by the Texas Railroad Commission. The state regulatory scheme has estab-

lished quotas for the production of natural gas from the Appling Field. Plaintiffs have alleged that the defendants attempted to subvert this scheme by agreeing among themselves to obstruct and frustrate the extraction of gas by plaintiffs so as to preserve the gas pool for defendants. While the Commission, through its production allowables, could restrain defendants' production of gas, it could not prevent defendants from inhibiting extraction by plaintiffs. Moreover, we are reinforced in our view that this conduct is not immune from federal antitrust regulation by virtue of the Texas statutory scheme itself, which recognizes the continued vitality of the antitrust laws within the natural gas industry. Tex. Rev. Civ. Stat. Ann. art. 6049d, § 13.

D. Sherman Act Section 2

The trial court held that even if the antitrust laws did apply, plaintiffs' allegations did not support a violation of section 2 of the Sherman Act. We now consider that ruling. In doing so we bear in mind that on reviewing a judgment notwithstanding the verdict we must "consider all of the evidence — not just that evidence which supports the nonmover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Boeing Co.* v. *Shipman,* 5 Cir. 1969, 411 F.2d 365, 374 (en banc).

Section 2 of the Sherman Act makes it unlawful to:

> ". . . monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. . . ."

Dispensing first with preliminaries, we think it obvious that the production, transportation, and sale of natural gas constitutes a "part of" "trade or commerce" for purposes

of the Sherman Act. See *United States* v. *El Paso Nat. Gas Co.*, 1964, 376 U.S. 651, 657, 84 S.Ct. 1044, 12 L.Ed.2d 12; *United States* v. *Grinnell Corp.*, 1966, 384 U.S. 563, 573, 86 S.Ct. 1698, 16 L.Ed.2d 778. Nor do we tarry long over defendants' argument that the complained of activities were intrastate without adverse impact upon interstate commerce. Crown and Alcoa did business in states other than Texas and were engaged in the production, transportation, and sale of gas from the Appling Field which entered into the flow of interstate commerce. The effect on interstate commerce need not have been gargantuan nor precisely mathematecized. It is sufficient if it is more than merely inconsequential. *California* v. *Lo-Vaca Gathering Co.*, 1965, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *Cherokee Lab., Inc.* v. *Rotary Drilling Services, Inc*, 5 Cir 1967, 383 F2d 97, *cert. denied*, 1968, 390 U.S. 904; *Utah Gas Pipelines Corp.* v. *El Paso Nat. Gas Co.*, D. Utah, 1964, 233 F.Supp. 955.

The difficult question is whether defendants monopolized, attempted to monopolize, or conspired to monopolize within the intendment of section 2. The offense of monopolization has been described by the Supreme Court to consist of the following elements:

> "[T]he offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp., supra,* 384 U.S. at 570-71.

The related offenses of attempting to monopolize and combining or conspiring to monopolize do not require that

actual possession of monopoly power be shown before the cause of action is established. However, they do require evidence of a specific intent to destroy competition or to build a monopoly. *Times-Picayune Pub. Co.* v. *United States,* 1953, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 1277; *Lewis* v. *Pennington,* 6 Cir. 1968, 400 F.2d 806, *cert. denied,* 1968, 393 U.S. 983; *United States* v. *Consolidated Laundries Corp.,* 2 Cir. 1961, 291 F.2d 563. There currently exists some dispute over whether either attempts to monopolize or conspiracies to monopolize require proof of the relevant market or ability to achieve monopoly power.[7] Since special issue number 2 would have permitted the jury to find a violation of any one of the three elements of Sherman Act section 2, plaintiffs and defendants devote sizeable portions of their arguments to this question. We do not resolve this conflict over the requisites of conspiracies or attempts, for we find that plaintiffs have satisfied the evidentiary requirements of the offense of monopolization. Disagreeing with the trial court, we hold that the Appling Field clearly constitutes the relevant geographic market, and that the jury

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[7] Thus, cases have seemingly split as to whether a dangerous probability of monopolization is an essential element of proof. Compare Bernard Food Indus., Inc. v. Dietene Co., 7 Cir. 1969, 415 F.2d 1279, 1284, cert. denied, 1970, 397 U.S. 912; Cliff Food Stores, Inc. v. Kroger, Inc., 5 Cir. 1969, 417 F.2d 203; Hiland Dairy, Inc. v. Kroger Co., 7 Cir. 1968, 402 F.Td 968, cert. denied, 1969, 395 U.S. 961, with Lessig v. Tidewater Oil Co., 9 Cir., 327 F.2d 459, cert. denied, 1964, 377 U.S. 993; United Staes v. Consolidated Laundries Corp., supra. See generally Bleech, Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market," 38 Geo. Wash. L. Rev. 215 (1969). Other cases have held that the requisite specific intent at least comprehends an intent "to gain control over some relevant market or to exclude competitors therefrom." AFL v. NFL, D.Md. 1962, 205 F.Supp. 60, aff'd, 4 Cir. 1963, 323 F.2d 124. Compare Bowl America, Inc. v. Fair Lanes, Inc., D.Md. 1969, 299 F.Supp. 1080, 1093, with United States v. Consolidated Laundries, Corp., supra.

could find that defendants possessed sufficient power in that market to monopolize the production of natural gas.

Defendants argue that the Appling Field cannot constitute a relevant market for it is a source of supply rather than a market. This argument, however, fails to recognize that "relevant market" is simply a short hand phrase used to describe "the arena within which the strength of competitive forces is measured." P. Areeda, *Antitrust Analysis* ¶ 201, at 71 (1967). It does not necessarily mean the selling place.

In *United States* v. *Pabst Brewing Co.*, 1966, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765, the Supreme Court reversed a lower court dismissal under § 7 of the Clayton Act, 15 U.S.C.A. § 18, grounded upon failure to prove the relevant market. The Court's language is instructive:

> "Apparently the District Court thought that in order to show a violation of § 7 it was essential for the Government to show a "relevant geographic market" in the same way the corpus delicti must be proved to establish a crime. But when the Government brings an action under § 7 it must, according to the language of the statute, prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce *"in any section of the country."* (Emphasis supplied.) The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States — "in *any* section" of the United States. This phrase does not call for the delineation of a "section of the country" by metes and bounds as a surveyor would lay off a plot of ground.[3] The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially

> lessened only in one or more sections of the country. In either event a violation of § 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant "economic" or "geographic" market is not an adequate ground on which to dismiss a § 7 case. Compare United States v. Continental Can Co. 378 US 441, 458, 12 L ed 2d 953, 964, 84 S Ct 1738. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." 384 U.S. at 549-550 (footnote omitted).

Cf. *United States* v. *Grinnell Corp., supra,* 384 U.S. at 573 (section 7's use of "any section of the country" equated to section 2's "any part of the trade or commerce among the several states").

Plaintiffs do not argue that defendants possess or have attempted to possess monopoly power over the marketing of natural gas. They instead contend that defendants possess monopoly power over the extraction of gas from the Appling Field. An essential fact in the natural gas industry is that adjoining land owners usually extract gas from a common gas reservoir. Thus, if one producer can inhibit or eliminate the extraction of gas by another, the inhibitor can prolong the life of the field and enhance his own future production figures. With regard to extraction of gas — which is at the heart of plaintiffs' complaint — the Appling Field therefore is the relevant area of competition. It is the "part" of "trade or commerce" with regard to which we must measure the power to exclude competitors. See

American Tobacco Co. v. *United States,* 1946, 328 U.S. 781, 809, 66 S.Ct. 1125, 90 L.Ed. 1575.

Directly in point is the recent decision in *Denver Petroleum Corp.* v. *Shell Oil Co.,* D.Colo. 1969, 306 F. Supp. 289. In *Denver Petroleum* plaintiffs alleged that defendant oil company had attempted to monopolize and had monopolized the purchase of crude oil and condensate in a particular oil production area by refusing to transport oil other than its own in its pipeline. With regard to the relevant market, the court stated:

> "The next matter for consideration is the problem of the so-called "relevant market". Our conclusion has been that for purposes of this case the relevant geographic area is Rio Arriba County, New Mexico, and particularly what has been called the Basin-Rio Arriba oil production area included therein. While it is likely that defendant's monopoly power extends as far as its illegal operation of the pipeline as private carriers is effective to isolate the crude supply, there is no real need to expand consideration to the other areas of Northwest New Mexico. Plaintiffs would have us believe that they propose to operate in the Basin-Rio Arriba oil production area; if there is not a monopoly there it matters not in this case that there might be monopoly power in other areas, and if there is, as we have found, a monopoly in that area, it similarly makes no difference, under our approach, that the monopoly may encompass a larger area.
>
> Defendant would have us engage in market analysis, considering the full breadth of "economic and competitive realities," to determine that the market structure is, if not nationwide, at least as broad as the entire Four Corners region. And there is no doubt whatever that Shell does not possess a monopoly of purchasing in any of these larger areas considered as a whole.
>
> However, in our opinion, such analysis is unnecessary in this case and the "relevant market" is in that

> sense irrelevant. We have here a practice illegal in itself, operation of the pipelines as private carriers, a purpose and the obvious natural effect of which was to exclude nonlocal competition from the crude supply which Shell badly needed. When one must "look" for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further." 306 F.Supp. at 304.

Likewise in the present case we can look to the Appling Field and see the existence of a practice "the obvious natural effect of which was to eliminate or thwart competitive extraction of gas from the Field by plaintiffs. Nor does it matter that this circumscribed area of competition is small, or that the effect on the public at the place of ultimate sale may be minor. In *Klor's* v. *Broadway-Hale Stores,* 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741, the Supreme Court considered the sufficiency of allegations under sections 1 and 2. There plaintiff, a single retail store operator, contended that defendants had conspired to boycott and to refuse to deal by not selling certain brands to plaintiff. The lower courts had dismissed the complaint because it had been shown that there were hundreds of other retailers near Klor's who sold many of the brands defendants refused to sell to Klor's. Thus, the courts reasoned, "there was no charge or proof that by any act of defendants the price, quantity, or quality, offered the public was affected." The Supreme Court reversed:

> "This combination takes from Klor's its freedom to buy appliances in an open competitive market and

> drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly,' " whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' International Salt Co. v. United States, 332 U.S. 392, 396, 92 L ed 20, 26, 68 S Ct 12." 359 U.S. at 213 (footnotes omitted).

We therefore hold that the trial court erred in finding that the Appling Field was not a relevant market. Nor do we hold, as defendants contend, that the issue of the appropriate relevant market should at least have been sent to the jury. In its instructions to the jury the court assumed as a matter of law that the Appling Field was the relevant market. Following the verdict the trial court felt compelled to change this ruling and granted judgment n.o.v. in part, reasoning that as a matter of law the Appling Field was not the relevant market. Since the pertinent facts are not in dispute, we hold that the Appling Field is a relevant market for determining monopoly power under section 2 and do not remand this issue for trial.

Viewing the Appling Field as the relevant market, we think the jury was warranted in finding that defendants possessed monopoly power in that Field. Defendants con-

tend first that the evidence demonstrates that plaintiffs in fact were able eventually to produce their production quota[8] so that defendants' lack of monopoly power is apparent. We disagree. While plaintiffs did eventually manage to produce their production quota, they incurred both increased expenditures and lost production due to defendants' conduct. More important, we do not think that absolute success in excluding competition is an essential element to proving monopoly power under section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition. The defendants here and their alleged co-conspirators owned or leased approximately 90% of the Appling Field. Their holdings were so situated that they could block transportation from competing wells. We think that the jury could find on this state of the facts that defendants possessed monopoly power in the Appling Field within the meaning of the Act.

Mere monopoly power in a relevant market, however, is not sufficient in itself to constitute a violation of section 2. *Grinnell* teaches us that monoply power is actionable only if it is willfully acquired or maintained. The instant case does not involve such obvious violations as price fixing or allocation of markets. Nevertheless, prior cases have amply demonstrated that conduct designed to barricade access to markets or inhibit production can constitute a proscribed means of monopolization. Judge Gewin, speaking for this court in *North Texas Producers Ass'n* v. *Young*, 5 Cir. 1962, 308 F.2d 235, 241, *cert. denied*, 1963, 372 U.S. 929, summarized some of the types of conduct which have been held violative of the Act:

> "Violations of the act have been manifested in numerous ways as illustrated by the following cases: The act

[8] Of course, plaintiffs allege that this quota was unjustifiably parsimonious due to defendants' filing of false nomination forecasts.

of a group of motion picture distributors who, together, have a monopoly in the distribution of pictures, who combined and conspired to refuse to furnish films to a particular exhibitor, to cause a breach of contracts with him and to prevent him from carrying on his business, Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308; a conspiracy of competing appliance retailers and manufacturers and distributors of appliances who agreed not to sell appliances to the plaintiff, Klor's, or to sell only at discriminatory prices or on unfavorable terms, even though there were opportunities to buy in a competitive market, Klor's, Inc. v. Broadway-Hale Stores, Inc., Admiral Corp., et al., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; the exclusion by a board of trade having monopolistic power, of an owner of a warehouse from a tobacco market, American Federation of Tobacco Growers, Inc. v. Neal, (4 Cir., 1950) 183 F.2d 869; exclusion of a competitor from a building and an appropriate market for business opportunities without justifiable business reasons, Gamco, Inc. v. Providence Fruit & Produce Building, Inc., (1 Cir., 1952) 194 F.2d 484; an agreement of brewers of beer not to sell to a particular person or class of persons, Johnson v. Schlitz, (D.C. E.D.Tenn., 1940) 33 F.Supp. 176; agreement among competitors to fix minimum resale prices of their products, Kiefer-Stewart Co v. Joseph E. Seagram & Sons, (1951) 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219. There are many other cases which present a myriad of situations demonstrating ingenuity, disguise, intrigue and subterfuge to avoid the appearance of law violation."

We think that plaintiffs' allegations come within the spirit and rationale of these cases. Basically, plaintiffs contend that defendants violated section 2 by (1) refusal to unitize or pool; (2) refusal to transport plaintiffs' gas; (3) harassment in drilling; and (4) refusal to grant a right-of-way to Southeastern. In essence, plaintiffs paint a picture of concerted action by defendants to restrain,

hinder, or eliminate plaintiffs' extraction of gas from the common gas reservoir shared with defendants. We are not saying that pooling, unitization, and joint operating agreements are in themselves maligned under the Sherman Act, but even if we consider that the Act impliedly immunizes these collective activities as benign in themselves, they cannot be the instruments of economic predatism or oppression. Buying and selling are innocent activities in and of themselves, but each can be converted into an antitrust malefaction. We think that the pattern of conduct alleged here may be held unlawful under the Sherman Act. Cases involving concerted refusals to deal,[9] see *Klor's* v. *Broad-*

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[9] Defendants spend a good deal of time arguing that as a matter of law there can be no finding of a refusal to deal by Lavaca. They first argue that since Lavaca is a wholly-owned subsidiary of Alcoa, does not carry gas for anyone else, and does not compete with Alcoa, any refusal was merely a unilateral refusal. Secondly, defendants argue that there was insufficient evidence to show that Woods tendered his gas to Lavaca. Conversely, plaintiffs argue that Lavaca did carry gas for other companies in addition to Alcoa; moreover, plaintiffs contend that under Texas law Lavaca is both a common purchaser, Tex. Rev. Stat. Ann. art. 6049a and a common carrier, Tex. Rev. Civ. Stat. Ann. art. 6050, and thus is under an obligation to carry plaintiffs' gas. Finally, plaintiffs allege that the evidence as to Woods' offer, while disputed, has been resolved by the jury in favor of plaintiffs.

We quickly dispose of the issue of the sufficiency of the evidence. There was here sufficient evidence upon which the jury might have found both that Woods tendered his gas which was then refused by Lavaca and that Lavaca carried gas for others. Likewise, we find without merit defendants' argument that the refusal to transport gas was merely a lawful unilateral refusal by Lavaca. Defendants first fail to realize that while section 1 or section 2 conspiracies evidenced by refusal to deal do require a combination or conspiracy between two or more entities, section 2 monopolization or attempted monopolization does not. Therefore, even if the refusal is viewed as the act of Alcoa, it would furnish a basis for finding monopolization or attempted monopolization if it constitutes either a "willful maintenance" of monopoly power or a specific intent to obtain monopoly power. See National Screen Service Corp. v. Poster Ex-

way-Hale Stores, supra; Times-Picayune Publishing Co. v. *United States, supra; National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F.2d 647, conspiracy to deny access to markets, see *North Texas Producers Ass'n* v. *Metzger Dairies, Inc.*, 5 Cir. 1965, 348 F.2d 189, *cert. denied*, 1966, 382 U.S. 977; *Premier Electrical Constr. Co.* v. *Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, and refusal to permit utilization of facilities, *Silver* v. *New York Stock Exchange, supra; Denver Petroleum Corp.* v. *Shell Oil Co., supra,* support the conclusion here that defendants violated section 2 of the Sherman Act. At least the jury could so find.

E. Damages

We next turn to the issue of damages. At trial the jury awarded Woods Exploration $500 and Southeastern $142,759.[10] Defendants claim this was error by making the following argument.

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change, Inc., supra, 305 F2d at 651-52; Fiumara v. Texaco, Inc., E.D. Pa. 204 F.Supp. 544, 552, aff'd, 3 Cir. 1962, 310 F.2d 737. However, we think that in any event the alleged action by Lavaca could not be characterized as a unilateral refusal to deal. Judge Thornberry has stated the rule with regard to section 1, and we feel it is equally applicable to conspiracies under section 2:

> "It is settled that 'common ownership and control does not liberate corporations from the impact of the antitrust laws.' Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219, and subsidiary or affiliate corporations are capable of of section 1 of the Sherman Act. *See, e.g.*, Timken Roller Bearing Co. v. United Sattes, 1951, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199; United States v. Yellow Cab Co., 1947, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010." Cliff Food Stores Inc. v. Kroger, Inc., supra 417 F.2d at 205-06.

Whether or not Lavaca was a common carrier under Texas law, the jury would be warranted in finding an illegal conspiracy to monopolize the field, evidenced in part by a refusal to transport plaintiffs' gas.

[10] See note 3, *supra*, where the jury's answers to the special issues are reproduced in full.

> "Furthermore, under the uncontroverted evidence all of the Appling Field gas wells and Appling Field gas involved was Woods' gas and not Southeastern's, and all dealing with reference to transportation of such gas from such wells was with Woods. Any refusal to deal by Appellees was limited by Question No. 3(a) to Woods or Woods Exploration & Producing Company and any damage award from refusal to deal or causing refusal to deal was limited by the jury answer to Question No. 8 to $500 to Woods Exploration & Producing Company."

We first note that, contrary to defendants' contentions, the answer to Question 3(a), which found that Alcoa and Crown refused to deal with Woods and Woods Exploration, does not preclude any damage award to Southeastern. Damages to Southeastern were predicated upon a finding that Lumar refused to transport plaintiffs' gas because of illegal conduct by defendants and Appling after the formation of Southeastern. The affirmative answer to Question 5 constitutes a jury finding that defendants did indeed prevent Lumar, acting through Wolcott, from consummating its deal with Southeastern despite the fact that Question 4 determined that Lumar's president never signed a contract. The affirmative answer to Question 3(a) merely constitutes an additional finding that defendants also refused to deal with Woods and Woods Exploration, based upon the evidence tending to show that Lavaca refused to transport Woods' gas prior to the formation of Southeastern. In Question 8 the jury found that the refusal to deal in Question 3(a) damaged Woods to the extent of $500. In Question 7 it found that defendants' conduct with respect to Lumar in Question 5 damaged Southeastern to the extent of $142,759. The latter damages are clearly supported by the evidence, consisting of (1) the cost of pipe which had been purchased by Southeastern to connect Woods' wells to

Lumar's line, and which could not be used since Lumar refused to deal; (2) the unnecessary expense incurred by Southeastern in building a second pipeline running alongside the Lumar line; and (3) the loss by Southeastern of the sale of 16,000 m.c.f. of gas per day occasioned by six weeks' loss of gas production due to Lumar's illegally-inspired refusal to deal. We therefore reject defendants' assertion that either damages must be limited to $500 or at least resubmitted to a jury.

On the other hand, plaintiffs argue that the trial court erred in eliminating from the jury's deliberations any possible damages which might have arisen from the lost opportunity to participate in the construction of a liquid extraction plant. Plaintiffs introduced evidence to show (1) that Southeastern and Lumar reached an agreement whereby Lumar would erect an extraction plant on its pipeline, and Southeastern would both share in the investment and participate in the profits; (2) that defendants thwarted this agreement to the damage of Southeastern; (3) that Southeastern reached similar tentative agreements Graver Oil & Gas Equipment Company and Marler Construction Company for the erection of a plant on the Southeastern pipeline; and (4) that defendants frustrated these agreements to the damage of Southeastern. The trial court, in its charge to the jury, excluded any consideration of damages flowing from the failure to construct an extraction plant.

This ruling was apparently based upon the fact that in a treble damage suit under § 4 of the Clayton Act, 15 U.S.C.A. § 15, plaintiff must allege and prove that he has been "injured in his business or property" by acts of the defendant proscribed by the antitrust laws. Since the extraction plant was simply a proposal and not a tangible reality, the court below must have felt that it did not

constitute "business or property." We think this was error. The rule of this circuit has been well stated by Judge Bell in *Martin* v. *Phillips Petroleum Co.*, 5 Cir. 1966, 365 F.2d 629, 633, *cert. denied*, 1967, 385 U.S. 991:

> "There are numerous decisions stating that one need not have an actual going business to obtain standing, but an attempt to enter a business is sufficient. Triangle conduit & Cable Co., Inc. v. National Electric Products Corporation, 3 Cir., 1945, 152 F.2d 398; American Banana Co. v. United Fruit Co., 2 Cir. 1908, 166 F.261; Waldron v. British Petroleum Co., Ltd., S.D.N.Y., 1964, 231 F.Supp. 72; Delaware Valley Marine Supply Company v. American Tobacco Company, E.D.Penn., 1960, 184 F.Supp. 440. However, these decisions lay down two significant requirements. First, there must be the intention to enter the busness; and second, there must be a showing of preparedness to enter the business. This is the rule in this circuit. See North Texas Producers Association v. Young, 5 Cir., 1962, 308 F.2d 235, cert. den., 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed 2d 733, where the court stated the rule, and that the plaintiff there met the business requirement."

See also *Denver Petroleum Corp* v. *Shell Oil Co., supra,* 306 F.Supp. at 307-08. We think that the evidence here could support a finding that plaintiff Southeastern had both the intention and the preparedness to construct an extraction plant and that, if the jury so finds, Southeastern would be entitled to damages. Therefore, upon remand, plaintiffs should be afforded an opportunity to prove such damages before a jury.

F. Reconciliation of the Verdict

Defendants finally contend that even if the judgment n.o.v. was improper, we may not simply reinstate the jury verdict that defendants monopolized, attempted to mono-

polize, or conspired to monopolize in violation of section 2. Rather, defendants argue, the answers to the special interrogatories are so hopelessly in conflict that we must at least reverse and remand for a new trial on liability. Defendants basically content that the answer of the jury to question number 1, that Alcoa and Crown had not combined or conspired in restraint of trade, cannot be reconciled with the affirmative answer to special interrogatory number 2, that Alcoa and Crown had monopolized, attempted to monopolize, or combined and conspired to monopolize in conjunction with one or more of several named persons. We find this argument without merit. Section 1 requires a combination or conspiracy. We think that the jury's negative answer to question number 1 was simply a recognition that the interrogatory was incomplete. That is, the jury found that Alcoa and Crown in combination only with themselves had not restrained trade. The evidence would support the conclusion that only with the aid of Appling and others were Alcoa and Crown enabled to restain trade through such conduct as refusing to deal with plaintiffs. This conclusion is wholly consistent with an affirmative answer to question 2, wherein the jury found that Alcoa and Crown monopolized, attempted to monopolize, or conspired to monopolize with Appling or others. Since the findings are reconcilable, we must assume that the jury intended this consistency. See generally *United States* v. *National City Lines*, 7 Cir., 186 F.2d 562, cert denied, 1951, 341 U.S. 916.

For the foregoing reasons, we reverse the judgment n.o.v. and order the district court to reinstate the jury verdict which found that defendants monopolized, attempted to monopolize, or conspired to monopolize with the result that plaintiff Woods Exploration was damaged to the extent of $500 and that plaintiff Southeastern was damaged to the

extent of $142,759. We further order the district court to hold a trial for the purpose of determining if plaintiffs' allegations with respect to the proposed extraction plant are true, and, if so, the extent of the damages flowing therefrom.

III.

We at last turn to the propriety of the injunction issued against plaintiffs by the court below which restrained plaintiffs from prosecuting their state court suit. That suit, filed just prior to the instant federal action, sought damages for (1) violations of the antitrust laws of the State of Texas; (2) willful misrepresentation to the Texas Railroad Commission; (3) tortious interference with contracts or advantageous business relationship and prevention of business expansion; and (4) violation of the Texas Common Purchaser's Statute. In addition, the plaintiffs sought exemplary damages. The district court, after rendering summary judgment and judgment n.o.v. in favor of defendants in the instant suit, enjoined plaintiffs from further prosecuting this state court suit.

The starting point for determining the legality of this action by the trial court is the federal anti-injunction statute, 28 U.S.C.A. § 2283, which reads:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

While earlier cases under the predecessor of this statute were to the contrary, *e.g.*, *Toucey* v. *New York Life Ins. Co.* 1941, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100, recent cases have held that the present anti-injunction statute permits a federal court "to enjoin the relitigation of cases and con-

troversies which have been fully adjudicated" in such court in order "to protect or effectuate its judgment." *Jackson* v. *Carter Oil Co.*, 10th Cir. 1950, 179 F.2d 524, 526-27, *cert. denied*, 1951, 340 U.S. 812; accord, *Jacksonville Blow Pipe Co.* v. *RFC*, 5th Cir. 1957, 244 F.2d 394; 1A J. Moore, *Federal Practice* ¶ 0.208 [3.—3], at 2319, Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726 (1961).

Plaintiffs, however, contend that the decisions in *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 1970, ... U.S. ....., 90 S.Ct. ....., 26 L.Ed.2d 234, and *Donovan* v. *City of Dallas*, 1964, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409, have eroded the "relitigation" exception. We disagree. Both cases caution against the dangers of federal-state friction which might be aroused by injunctive interference, but neither decision purports to undermine the exceptions of § 2283. In *Donovan* the Supreme Court held that a state court cannot validly enjoin a person from prosecuting an *in personam* action in a federal court which has jurisdiction of the parties and of the subject matter. The decision was grounded upon the fact that federal-court remedies are rights "granted by Congress and cannot be taken away by the State." The converse proposition, however, does not hold true, for Congress can authorize federal interference with state court remedies in order to protect federal jurisdiction. The Court in Donovan said as much when it noted:

> "While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances [citing § 2283], it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." 377 U.S. at 412-13.

In Atlantic Coast Line R.R. the Court simply decided that federal courts do not have inherent power to enjoin state proceedings but must abide by the express exceptions to § 2283. The Court reasoned:

> "On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondent here has intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1954 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." Amalgamated Clothing Workers v. Richman Brothers, 348 US 511, 515-516, 00 L.Ed 600, 607-608, 75 S Ct 452 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."
>
> ..... U.S. at .....

The "relitigation" principle, therefore, retains its vitality and means simply that a federal court may enjoin a state

proceeding which is precluded under the doctrine of *res judicata*. As one commentator has noted, "this is a sensible solution to the problem of relitigation of federal decisions. It prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review." Note, *Federal Power to Enjoin State Court Proceedings, supra*, at 734. See also *Developments in the Law — Injunctions*, 78 Harv. L. Rev. 993, 1052 (1965). We think that in the instant case the district court decision was *res judicata* of the state proceeding and thus justified the issuance of an injunction.

The principle of *res judicata* "makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding." 1B J. Moore, *Federal Practice* ¶ 0.405 [1], at 624. Plaintiffs argue that this doctrine is inapplicable with respect to concurrent federal and state antitrust suits. They contend that "a person who has suffered damages in his business or property by reason of violations of the antitrust laws of the United States and those of the State of Texas may pursue his remedy in both federal and state courts and recover damages in each action." In essence, plaintiffs would have us hold that their state and federal court suits do not constitute alternative avenues to remedy the same wrong.

It is true that numerous cases have held that the federal antitrust laws are not preemptive of state antitrust regulation. E.g., *Standard Oil Co. v. Tennessee*, 1910, 217 U.S. 413, 30 S.Ct. 413, 54 L.Ed. 817. Texas courts, recognizing the complementary features of this federal-state regulation, have further held that the pendency of a federal antitrust

action involving the same parties and the same operative facts does not preclude the prosecution of a state action. E.g., *Sessions Co.* v. *W. A. Sheaffer Pen Co.*, Tex. Civ. App. 1961, 344 S.W.2d 180; *Bergholm* v. *Peoria Life Ins. Co.*, Tex. Civ. App. 1933, 63 S.W.2d 1064. This does not mean, however, that the federal and state suits constitute separate causes of action. Rather, those cases simply hold that prior to a final judgment the federal antitrust laws do not have a preemptive effect. Cf. *Areeda, supra*, at 56-59. We therefore reject plaintiffs' contention that the decision of *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343, which held that plaintiffs had alleged a cause of action under state law, is now the law of the case and precludes the injunction issued by the court below. That case arose prior to any final decision in the instant case and has no bearing on any preclusive effect that might be accorded the federal decision once rendered.

Nor are we persuaded that the state and federal suits constituted separate causes of action because they alleged the violation of primary duties imposed by separate sovereignties — the state and federal governments. Cases have held that both the state and federal governments may enforce concurrently their antitrust laws, see *United Shoe Mach. Co.* v. *United States*, 1922, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708; *State* v. *Southeast Texas Chapter of Nat. Elec. Contr. Ass'n*, Tex.Civ.App. 1962, 358 S.W.2d 711, but the court in *F. L. Mendez & Co.* v. *General Motors Corp.*, 7 Cir. 161 F.2d 695, cert. denied, 1947, 332 U.S. 810, pointed out the inapplicability of such analogies to private antitrust suits:

> "The essential teaching [referring to *United Shoe* where Court permitted separate government suits under Sherman and Clayton Acts] is that the Govern-

ment had a right to complain of violations of each of two different statutes. Here we are deciding the question of whether a plaintiff who avers that his contract right to sell defendant's automobiles has been invaded through the wrongful action of defendant may maintain a second action therefor after once having lost. We hold that such a plaintiff can not split that cause of action; that he must assert in his suit all wrongful acts on the part of defendant upon which he relies to show invasion of his asserted right and that, if he fails, he may not, later, recover in another suit for invasion of the same right by wrongful acts on defendant's part which he failed to assert in his original suit. It is clear that plaintiff suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or another of wrongful actions by defendant or to a combination of some or all of them. There is, under either view, but a single wrongful invasion of a single primary right, whether the acts constituting such invasion are one or many, simple or complex. Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069."

We think the proper test was stated in *Englehardt* v. *Bell & Howell Co.*, 8 Cir. 1964, 327 F.2d 30, 31, where the court rejected plaintiff's allegation that the "district court erred in granting appellee's motion for summary judgment because a cause of action based upon violation of the federal antitrust acts (Title 15, U.S.C.) is distinct from a cause of action based upon state antitrust law, and not barred under the doctrine of *res judicata* by the prior adjudication of cases based upon such state claims." The court held that "the primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action." *Id.* at 32. See also *Seaboard Coast Line R.R.* v. *Gulf Oil Corp.*, 5 Cir. 1969, 409 F.2d 879. Applying this

test to the instant case, we hold that plaintiffs' state action consists simply of alternative grounds of recovery for violations of the same primary rights alleged in the present federal action. The state action was characterized by the Texas Supreme Court as follows:

> "Appellants, Woods Exploration & Producing Company, Inc., and Southeastern Pipe Line Company, sued appellees, Aluminum Company of America, Crown Central Petroleum Corporation, Carl E. Siegesmund, Lavaca Pipe Line Company, Lumar Gas Corporation F. E. Appling and Fred Wolcott, for damages allegedly due to violations of the Texas Antitrust Statutes involving a conspiracy and combination by appellees to eliminate appellants and small tract owners from competing in the production of gas from the Appling field located in Calhoun and Jackson counties, Texas, and to restrict production from appellants' wells. The conspiracy was allegedly carried out by various means, one of which was the filing of false and fictitious nominations or Producers Forecasts with the Railroad Commission of Texas." 382 S.W.2d at 344-45.

In this light, our decision in *Norman Tobacco & Candy Co.* v. *Gillette Safety Co.*, 5 Cir. 1961, 295 F.2d 362, is directly in point. Plaintiff there had brought simultaneous but separate suits in the district court, alleging in one that the defendant breached its contract to sell shaving products to plaintiff and alleging in the other that defendant's refusal to deal was a violation of the federal antitrust laws. The contract action went to trial first and Gillette won. Thereafter, the trial court entered summary judgment on behalf of Gillette in the antitrust case, and this court affirmed on the basis inter alia that the contract action was *re judicata* of the antitrust action:

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials

on the same alleged breach of duty. Basically, Norman claimed the same "right" in both suits — the right to purchase Gillette products direct from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the anti-trust laws as the basis for the alleged breach. But there was one breach and one only and appellant has had its day in court and has lost. It cannot litigate this same breach again. Ballard v. First National Bank of Birmingham, 5 Cir., 1958, 259 F.2d 681; Mendez & Company v. General Motors Corporation, 7 Cir., 1947, 161 F.2d 695, and Williamson v. Columbia Gas & Electric Company, 3 Cir., 1950, 186 F.2d 464, certiorari denied 1951, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355. The mere fact that Gillette's refusal to sell alleged to have been wrongful for one reason and, in the present case for another reason, does not alter the fact that the cause of action was for the same injury. Appellant cannot get away from the fact that there has been a violation of one right by a single legal wrong. Restatement, Judgments, Sec. 63".
295 F.2d at 363-64.

Similarly, in the instant case plaintiffs claimed violations of the same primary rights arising out of the same facts asserted in the state court suit. The state and federal antitrust claims here are, therefore, simply alternative grounds of recovery for the same causes of action. The principle of *res judicata,* enforceable by injunction, would thus preclude relitigation in the state following this federal judgment if the state and federal counts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated

plaintiffs for the total harm suffered. See Note, *Parallel State and Federal Remedies,* 71 Har. L. Rev. 513, 523-24 (1957). Alternatively, even if different standards of recovery existed in the state and federal actions, *res judicata* would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings. See Restatement. Judgments § 62. Focusing on the latter test, we think that the doctrine of pendent jurisdiction, see *Hurn v. Oursler,* 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, afforded plaintiffs opportunity for joinder.[11]

In *United Mine Workers of America* v. *Gibbs,* 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, the Supreme Court established a liberal rule for judging the availability of pendent jurisdiction:

> "This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then,

[11] Plaintiffs allege that they did in fact join their state claims in the federal action, but had them dismissed by the court. We find this contention unfounded. An examination of the pleadings reveals no reference to any state claims.

> assuming substantiality of the federal issues there is *power* in federal courts to hear the whole." Id. at 725 (footnote omitted).

See also *Whirl* v. *Kern*, 5 Cir., 1969, 407 F.2d 781, *cert. denied*, 1970, 396 U.S. 901; Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968). Numerous decisions have applied this principle to permit the joinder of federal antitrust claims and related state claims. E.g., *Kurth* v. *Erie-Crawford Dairy Coop. Ass'n*, 3 Cir. 1968, 395 F.2d 420; *Otto Milk Co.* v. *United Dairy Farmers Coop. Ass'n, supra*, 388 F.2d at 798; *Peerless Dental Supply Co.* v. *Weber Dental Mfg. Co.*, E.D. Pa. 1969, 299 F.Supp. 331. Since the district court had power to adjudicate both federal and state claims, plaintiffs are consequently barred from prosecuting the state court because the federal court suit was *res judicata* of all issues alleged in the state court. See *McCann* v. *Whitney*, Sup. Ct. 1941, 25 N.Y.S. 2d 354; Note, *Parrallel State and Federal Remedies, supra*, at 523-25.

Clearly, therefore, at the time the trial court entered the injunction it was empowered to do so because there was at that time a final judgment on the same causes of action asserted in the state suit, which judgment it could protect by injunction.

The question arises, however, as to whether or not the injunction may be continued in light of our actions on appeal. We hold that the injunction may not be continued. It is clear that the power to issue an injunction restraining further proceedings in a state court rests on the existence of a final judgment which has a *res judicata* effect on the particular causes of action which are asserted in the state Suit. It is also obvious that a judgment later reversed on appeal has no *res judicata* effect after the reversal. 1B J. Moore, Federal Practice ¶ 0.416 [2].

In the instant case we have reversed and remanded certain issues for trial. As to these issues there is now no final judgment and hence no basis for an injunction against further state court action. On another issue we have reversed the trial court and ordered the jury's verdict reinstated. As to this matter the trial court may, if it wishes, render a partial final judgment under Fed. R. Civ. P. 54. If the trial court does order such a partial final judgment, then it may enjoin further proceedings in the state suit on claims covered under the doctrine of *res judicata* by that judgment. In addition, when a judgment or judgments are rendered as to the other claims raised in this suit, then the trial court may in its discretion issue another injunction to protect the final judgment or judgments.

IV.

We have at least reached the end of our long and protracted journey through the Appling Field and points beyond. We find it unnecessary to prolong that journey by a discussion of certain additional points of error raised by the parties, since we find them without merit. In view of the length of this opinion, we now summarize our conclusions.

First, we reverse the summary judgment for defendants with regard to the filing of false nominations and remand the issue for trial.

Second, we reverse the judgment n.o.v. with regard to monopolization and order the district court to reinstate the jury verdict which found both liability and damages. We further remand for trial the issue of damages flowing from defendants' alleged conduct with regard to the proposed extraction plant.

Third, we vacate the injunction restraining plaintiffs from prosecuting their state court suit, but we authorize the

district court in its sound discretion to enjoin the future pursuit of some or all of the state claims if and when a complete or partial final judgment is entered in the instant case.

REVERSED and REMANDED IN PART.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 28763 and 29487

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,

Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA, ET AL,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan 5, 1971, 5 Cir., 1971, ... Fd2d .....).

(March 17, 1971)

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts shall encompass all those issues which are associated with antitrust actions.

RAILROAD COMMISSION OF TEXAS, ET AL.,

Appellants,

v.

WOODS EXPLORATION AND PRODUCING COMPANY, ET AL.,

Appellees.

No. A-10825.

Supreme Court of Texas.

June 22, 1966.

Rehearing Denied July 27, 1966.

WALKER, Justice.

This is another controversy between operators with wells on large tracts and those with wells on small tracts in the Appling Gas Field in Calhoun and Jackson Counties. Substantially the same parties have been before us on two previous occasions. In the first case it was held that each of the vertically separated reservoirs underlying the Field was to be considered as a separate reservoir in determining the right to a Rule 37 exception. The action of the Railroad Commission in allowing a small tract operator to make multiple completions from a single well bore in the gas sands under her property was upheld, even though production from one sand would have enabled her to recover more than the quantity of gas under her land. Benz-Stoddard v. Aluminum Company of America, Tex.Sup., 368 S.W.2d 94. In the second case it was held that the large tract operators were precluded by lapse of time from attacking the ⅓–⅔ formula established by the Commission for allocating production from the Field, even though use of the formula allowed the wells on small tracts to drain substantial quantities of gas from the larger units. Railroad Commission of Texas v. Aluminum Company of Am-

erica, Tex.Sup., 380 S.W.2d 599. The question to be decided now is whether the Commission may, for the purpose of protecting correlative rights, establish a ceiling on the monthly allowable of gas to be produced from a reservoir.

By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for five reservoirs in the Appling Field. This suit was instituted by Woods Exploration & Producing Co., Inc. et al. against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others who are interested in small tract wells intervened as plaintiffs, while Aluminum Company of America and other large tract operators intervened and aligned themselves with the Commission. After the trial court rendered summary judgment in favor of the plaintiffs, declaring the order invalid and enjoining the Commission from enforcing the same, the Commission and the large tract operators prosecuted a direct appeal to this Court as authorized by Article 1738a.[1]

The question presented for decision is relatively narrow, but a rather full statement is necessary to an understanding of the contentions made by the parties. Section 12 of Article 6008 provides that the Commission shall fix the monthly allowable of gas to be produced from a reservoir "at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity." It then directs that the monthly reservoir allowable be allocated among the wells entitled to produce from the reservoir so as to give each well its fair share of the gas to be produced, with the proviso that each well shall be restricted to the amount of gas that can be produced without waste. These and

[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

other provisions of Article 6008 will be adverted to later in this opinion.

The usual procedure for fixing the monthly gas allowable for a reservoir is set out in Statewide Rule 31. Under its provisions market demand is ordinarily determined primarily on the basis of Producers' Forecasts filed with the Commission by operators having wells completed in the reservoir. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month, and an operator may forecast any amount he desires provided it does not exceed the delivery capacity of his wells. If the Commission concludes that use of the forecasts does not result in a correct determination of reasonable market demand for the reservoir, it takes into account other pertinent facts such as average production for the previous twelve months or nominations filed by purchasers of gas. The power to do so is expressly recognized by Statewide Rule 31.

Under the provisions of Article 6008 mentioned above and where waste is not involved, market demand as determined by the Commission becomes the monthly reservoir allowable. The allocation formula applicable to the field is then used to divide the reservoir allowable among the wells entitled to produce from the reservoir. In the case of the Appling Field, this is the ⅓–⅔ formula we refused to strike down in Railroad Commission of Texas v. Aluminum Company of America, supra. Subject to any inequities inherent in the allocation formula, each well thus receives its fair share of the gas produced provided all wells are capable of producing their allowables. A well incapable of producing the allowable that would normally be assigned to it is known as a limited capacity well. Under prevailing Commission procedures, limited capacity wells are assigned

the maximum allowables they can produce, and the remainder of the allowables they would otherwise be entitled to receive are allocated to other wells in the field.[3] This brings us to the problem dealt with by the Commission in its Special Order No. 2-53,009. There is no dispute as to any of the material facts. Waste is not involved in the case, and there is nothing in the record to suggest that any gas produced from the Appling Field has been devoted to unlawful uses.

As indicated above there are a number of vertically separated reservoirs in the Appling Field. Five of these reservoirs are covered by the Commission's order here in issue. One of them, the Middle Kopnicky, is the deepest and by far the largest and most productive reservoir in the Field. It originally contained more than 360 billion cubic feet of gas. Each of the other four reservoirs covered by the order overlies the Middle Kopnicky and originally contained between 3 and 4½ billion cubic feet of gas. Under Rule 37 exceptions granted by the Commission, appellees and other town lot lessees were permitted to drill numerous wells on small tracts, most of them containing approximately 1/10 of an acre, and to make multiple completions from a single well bore in each of the several reservoirs underlying their lots.

The small tract wells have delivery capacities similar to those of the wells located on large tracts. A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions. This well bore communication distorted the producing capability

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[3] Appellees say, and appellants do not deny, that this method of determining the amount each well may produce is expressly sanctioned and required by the provisions of Rule 5, which established the ⅓-⅔ allocation formula for the Appling Field.

of the upper zone well completions and thus enabled the operators to file forecasts far in excess of what the true delivery capacity of the wells would have been in the absence of such communication. It had that effect because, as pointed out above, the amounts of the forecasts are limited only by the delivery capacities of the wells.

The ⅓-⅔ allocation formula in itself gave the small tract wells a tremendous drainage advantage over the larger gas units. Prior to the adoption of the order now in question, the Commission determined that operators of many wells on small tracts were following the practice of filing forecasts at or near the full delivery capacity of their wells. These forecasts, when combined with those filed by other operators and handled in accordance with the usual Commission procedure outlined in Statewide Rule 31, resulted in the assignment of very large reservoir allowables. The reservoir allowables were so great that the large tract wells, even though they had normal or even maximum delivery capacities, were incapable of producing the allowables representing their fair share of the gas as determined by allocation formula. They were accordingly classified as limited capacity wells and assigned the maximum allowables they were capable of producing; the remainder of the allowables to which they were entitled under the allocation formula was reallocated among the town lot wells. This enabled the latter to produce far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula, and the drainage advantage which the small tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced.

An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500', and 18 wells were completed therein. Seven-

teen of these wells were located on 7.132 acres, while the remaining well was situated on a 328-acre unit. Since the 17 small tract wells have a large aggregate delivery capacity, their operators were able to make correspondingly large forecasts for the month of July, 1964. The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic ⅓-⅔ allocation formula, the large tract well was entitled to an allowable of 591,000 MCF, but the productive capacity of the best well completed in the reservoir was approximately 87,000 MCF per month. The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 57,000 MCF were allocated to the town lot wells for the one month in addition to their shares of the reservoir allowable as determined by application of the ⅓-⅔ formula.

Aluminum Company of America requested the Commission to amend Statewide Rule 31 as applied to the Appling Field by either (1) establishing a formula for computing the maximum quantity of gas that might constitute market demand for a reservoir, or (2) discontinuing the practice of reallocating the excess allowables of limited capacity wells. The Commission chose the first alternative and entered Special Order No. 2-53,009 adopting Field Rule 11, the relevant portions of which are quoted in the margin.[3]

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[3] "Rule 11: a. The reasonable market demand for the Appling, Segment 5, 7500'; the Appling, Segment 6, 7500'; the Appling, Segment 6, 7600'; the Appling, Segment 6, 7600', Lower; and the Appling, Segment 'A' Kopnicky, Middle Fields, Jackson and Calhoun Counties, Texas, shall be allocated to each well in each field in accordance with the allocation formula for such field.

This is the order now under attack. Its effect is to establish as a ceiling on reasonable market demand the quantity of gas which, when fixed as the monthly reservoir allowable, would permit the well on the largest proration unit, if its delivery capacity were equal to the largest delivery capacity of any well in the reservoir, to receive an allowable it would be capable of producing.

It is unnecessary for us to consider some of the arguments advanced by appellees in support of the trial court's judgment. As we view the case, the basic issue is whether the procedure for determining maximum market demand established by Rule 11 is beyond the authority delegated to the Commission by the Legislature in Article 6008. Appellees rely primarily upon the provisions of Section 12 mentioned above. It is their contention that the statute requires the Commission to determine lawful market demand and then, where waste is not involved, set the reservoir allowable at the amount of the market demand so determined. They insist that Rule 11 is invalid because it fixes an arbitrary limit based upon factors which have nothing to do with market demand.

Appellants emphasize Sections 1 and 22 of Article 6008, which provide as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use

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b. The daily reasonable market demand for gas for each of the mentioned fields shall be the lesser gas volume figure as determined *either* by summation of nominated volumes taken from producers' forecasts, *or* by dividing the reported productive capability as shown on the GWT-2 test of the well exhibiting the greatest ability to deliver gas to normal gathering facilities by the participation factor of the largest proration unit.

c. The monthly reasonable market demand for gas shall be determined by multiplying the daily reasonable market demand by the number of days in the month."

thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

They say that the remainder of the statute, and particularly the sections upon which appellees rely, must be construed in the light of these provisions. Since the declared purpose of the law is the protection of public and private interests by prohibiting waste and compelling ratable production, they contend that the Commission may properly consider the protection of correlative rights as one of the relevant factors in determining reasonable market demand. The Commission takes the position, therefore, that reasonable market demand is the total figure that allows each operator to produce his fair and allocated share of gas from a common reservoir within the framework of the existing allocation formula. Appellants further insist that the reservoir allowable and the individual well allocations are necessarily intertwined and constitute inseparable parts of a single whole. They point out that a reservoir allowable is not reasonable if it results in unreasonable well allocations, and from this premise they argue that the determination of reasonable market demand must be left to the discretion of the Commission so that unique situations such as that existing in the Appling Field can be handled through special regulation.

Appellants make a strong case for granting the Commission power to consider correlative rights in establishing a

reasonable reservoir allowable, but our problem is to determine whether the Legislature has done so. From a reading of Article 6008 and other statutes in pari materia therewith, we agree with appellants that the term "lawful market demand" as used in the third and fourth sentences of Section 12 means reasonable market demand for lawful uses. After considering all the provisions of Article 6008, however, it seems clear to us that the Legislature did not intend to authorize production from a reservoir to be limited to less than reasonable market demand except for the prevention of waste.[4]

Section 10 of the statute makes it the duty of the Commission to regulate daily gas well production "in the manner and method herein set forth." The Commission is then directed in general terms to prorate and regulate production

[4] This conclusion is further supported by the history of our oil and gas conservation laws. The first Texas statute prohibited waste and authorized the Commission to "do all things necessary for the conservation of oil and gas." Acts 1919, 36th Leg., p. 285, ch. 155. It was only after extended controversy that the Legislature adopted the so-called "Market Demand Act" in 1932. Acts 1932, 42nd Leg., 4 C.S., p. 3, ch. 2. This was preceded by the "Anti-Market-Demand Act," which provided that waste "shall not be construed to mean economic waste, and the Commission shall not have power to attempt by order, or otherwise, directly or indirectly, to limit the production of oil to equal the existing market demand for oil." Acts 1931, 42nd Leg., 1 C.S., p. 46, ch. 26. Governor Sterling is reported to have declared that he would veto a bill which authorized limitation of production to reasonable market demand, because he was interested only in preventing physical waste and could not see how limitation of production to reasonable market demand would have the effect of preventing waste. See Hardwicke, Legal History of Proration of Oil Production in Texas, Texas Law Review, 1937 Bar Association Number, p. 99. Against this background, it is rather difficult to believe that when the Legislature finally authorized the Commission to limit production to reasonable market demand, it meant that an even lower figure might be set whenever the Commission concluded that the same would constitute a reasonable reservoir allowable under all the circumstances.

for the protection of public and private interests in the prevention of waste and the adjustment of correlative rights, but the Legislature did not stop with this general grant of authority. Section 11 tells us when the powers granted by Section 10 may be exercised. The Commission is instructed there to regulate and prorate production for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission" that potential production is in excess of reasonable market demand. This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding. It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22.

The second sentence of Section 12 provides that when the Commission finds that waste exists or is imminent or that the productive capacity of the wells exceeds market demand, it "shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis." If the Legislature had intended for the Commission to fix as the reservoir allowable any amount that might be reasonable under all the circumstances, Section 12 probably would not have gone beyond the first two sentences. See Rudman v. Railroad Commission of Texas, 162 Tex. 579, 349 S.W.2d 717. Instead of stopping at that point, however, the lawmakers spelled out in some detail how the Commission's duty to regulate gas production is to be performed. It is directed to determine each month: (1) the lawful market demand for gas to be produced from the reservoir during the following month; and (2) the volume of gas that can be produced from the reservoir and from each well therein during such month without waste.

The statute then provides in plain language that the monthly reservoir allowable of gas shall be fixed at the lawful market demand therefor or at the volume that can be produced without waste, whichever is the smaller quantity. In allocating the reservoir allowable among the wells, the Commission is authorized by Section 13 to consider the size of the tracts, the productive capacity of the wells, and "all other factors which are pertinent." It seems rather significant then that the Commission was not given similar authority in fixing the reservoir allowable.

The Legislature undoubtedly contemplated that each well would receive its fair share of the gas produced, but it also specified the means by which that end is to be accomplished. In our opinion the fixing of the reservoir allowable is controlled by the clear and explicit terms of Section 12, and the authority granted to the Commission in that respect is not enlarged by the more general provisions of Sections 1 and 22. "The correction or relaxation of the Section 12 requirements is a legislative matter if the allowables fixed by the Commission pursuant thereto are seriously fallible." Rudman v. Railroad Commission of Texas, supra.

In adopting the order now in question, the Commission has set an arbitrary limit on reasonable market demand for gas from the reservoir and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand, and we agree with the trial court that the order is beyond the power delegated to the Commission by the Legislature. Appellants point out that Rule 11 will serve to reduce or eliminate any distortion in the reservoir allowables resulting from well bore communication or exorbitant forecasts, but this is purely incidental. The formula prescribed thereby is not related in any way to the quantity of gas passing between the reservoirs or to the amount by which the forecasts might be regarded as excessive.

We do not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month. Use of these nominations is merely an administrative device, and the Commission may consider and give appropriate weight to all facts that are relevant to a determination of reasonable market demand.

Appellants cite Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S.W.2d 173, Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961, and Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 101 A.L.R. 1393. The opinions in these cases contain general expressions regarding the discretion vested in the Commission and its power to regulate production to protect correlative rights, but none of them throws any light on the question now before us. Appellants also direct our attention to the opinion in *Benz-Stoddard,* where it was said that the validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of gas that no unreasonable hardship need result from its application. We adhere to that view, but this Court is not authorized to enlarge the powers granted to the Commission by the Legislature.

It is also argued that the summary judgment was improper because there is no showing that the reservoir allowable determined for any month by use of the procedure provided in Rule 11 was less than the actual reasonable market demand for that month. Appellants cite Railroad Commission of Texas v. Houston Natural Gas Corp., 155 Tex. 502, 289 S.W.2d 559, as supporting this argument. In that case a rate established by the Commission was attacked as confiscatory, and we held that the manner in which the Commission arrived at its results was not material if the rate actually yielded a fair return. The decision might be

in point if the present suit had been brought for the purpose of questioning the reservoir allowable fixed for a particular month, but here we are concerned with an order which prescribes the use of an illegal method for determining the allowable at all times in the future. The order is subject to attack even though the reservoir allowable calculated in accordance with its provisions for a certain month might not be substantially more or less than the reasonable market demand for gas from the reservoir.

The judgment of the trial court is affirmed.

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for *five reservoirs* in the Appling Field. Woods Exploration & Producing Co., Inc., et al., instituted this suit against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others intervened as plaintiffs. Claire Benz-Stoddard intervened as plaintiff. Aluminum Company of America, Crown Central Petroleum Corporation and others intervened as defendants and aligned themselves with the Commission in an effort to uphold the order.

Plaintiffs and defendants filed motions for summary judgment. The trial court sustained plaintiffs' motion and entered a judgment that "* * * the ruling of the Railroad Commission on November 4, 1964 and the formal order thereon by the Railroad Commission dated February 1, 1965, being Special Order #2 53,009, effective December 1, 1964, adopting a new procedure for determining the maximum limit on the daily reasonable market demand from the five gas reservoirs, being Appling (Seg. 5) 7500'

field, and the Appling (Seg. 6) 7500′ field, the Appling (Seg. 6) 7600′ field, and the Appling (Seg. 6) 7600′ lower field, and the Appling (Seg. A) Middle Kopnicky Field, situated in Calhoun County, Texas, is not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. and the undisputed facts and is therefore null and void."

This Court has upheld the trial court judgment. This action of the Court effectively withdraws from the Commission the power granted it by the Legislature to consider correlative rights in establishing a reasonable reservoir allowable. I do not agree with the Court that Article 6008[1] or any section thereof either expressly or by implication withholds from the Commission the power to adjust correlative rights. The history of Article 6008 and other statutes in pari materia does not warrant the drastic holding made herein. I will agree that the Court has narrowed the question, but the result reached is destructive in that it takes from the Commission every semblance of power that this Court has in past decisions recognized that it possessed. The Rudman opinion is the Court's principal authority. That case, as I will later demonstrate, involved no issue concerning the fixing of the field allowable for the field there involved. The plaintiffs cite authorities[2] which have no application here. Those are cases wherein the definition of market demand was reached in dealing with statutes relating to market demand for oil. The market demand for

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[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

[2] Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, Tex.Civ.App., 49 S.W.2d 837 (1932) reversed at 122 Tex. 243, 56 S.W.2d 1075 (1933); Railroad Commission v. Continental Oil Co., 157 S.W.2d 695 (Tex.Civ.App.1941, err. refused, w. o. m.); Colorado Interstate Gas Co. v. State Corporation Commission of Kansas, 192 Kan. 2, 386 P2d 266 (1964).

oil is usually determined on a *state-wide basis* pursuant to Article 6049d, Section 6, and Article 6014, rather than on a field-wide or reservoir basis pursuant to Article 6008.[3]

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[3] Art. 6008. "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"• • •

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month.

"• • •

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

Sections 1 and 22, especially, and even Section 12, do not limit the power of the Commission to enter only such orders as prevent waste. To the contrary the Article specifically directs the Commission to give consideration to protection of correlative rights.

The Commission was confronted with the type of evil mentioned in Section 1 when it adopted the order under consideration. The Commission realized that the undisputed facts warranted action to protect correlative rights and that without the order some of the owners of gas in the reservoirs here involved would not be able to obtain their fair share and would not be able to *produce* and *use* their fair share of the gas in the five reservoirs described in the order. Since the facts are undisputed, I deem it sufficient to state here excerpts from the affidavits of Kenneth B. Ford, affidavits 1 and 2 of Bob R. Harris and the affidavit of James E. Werner, all of which were attached to and in support of Defendants' motion for summary judgment.

Kenneth B. Ford's affidavit dated April 24, 1965, gives the following summation which shows the true picture at the time of entry of the order under attack.

> "13. My study of producer's forecasts, allowables, and production for small tract wells (two acres or less) in these five reservoirs shows that at the present time [April 24, 1965] and for the past several years, these operators of small tract wells, with few exceptions, have been nominating and/or receiving allowable for and/or producing each month more gas than was originally in place under their tracts in these reservoirs.
>
> "14. Based on the facts presented in this Affidavit, it is clear that the special conditions that exist in these five Appling Field Reservoirs do not exist outside the Appling Field in any reservoir in Railroad Commission Districts 2, 3 and 4 and that statewide procedure as outlined in Statewide Rule 31 is not adequate for

> these special conditions. For this reason, Special Field Rule 11 writen by the Commission is reasonably necesnary for effective and fair regulation in these fields."

Ford's affidavit refers to information received from James E. Werner, Senior Geologist, since January, 1956. Werner's affidavit, attached to Railroad Commission's motion for summary judgment, recites that he had made an extensive study of all geological data in the Appling Fields, including induction electric logs on all wells, and micro-logs, core analyses, formation test results, sonic logs and formation density logs from all wells where such logs tests and analyses were obtained.

Affidavit No. 2 by Bob R. Harris, an employee of the Railroad Commission states:

> "The Aluminum Company of America application was to amend the Commission's procedure for determining maximum reasonable market demand for *all reservoirs* in the Appling Fields, but the evidence submitted at that time was not sufficient in the opinion of the Commission to justify applying it to all reservoirs. This is the reason the order applied only to the 5 reservoirs covered by the order."

Werner's affidavit states:

> "I have prepared structure maps of the productive area of the gas reservoirs referred to below [the five involved] based on this study, and have determined by planimeter the number of productive acres in each reservoir. The results of this are set out below."

Werner's affidavit shows the results of these tests to be as follows:

> "APPLING (SEGMENT A, KOPNICKY, MIDDLE) FIELD
>
> "The Appling (Segment A, Kopnicky Middle) Field is the deepest reservoir in the Appling Fields, and also

by far the largest. The other productive reservoirs, including those referred to below, lie above the Middle Kopnicky Sand. In my opinion, this reservoir originally contained 4,288 productive surface acres, of which Aluminum Company of America, Crown Central Petroleum Corporation and Pocantico Oil & Gas Corp. (Alcoa et al) have approximately 3,702 acres under lease. I have prepared an isopach map of the original net effective sand which is productive of gas in this reservoir, which was furnished to Mr. Kenneth B. Ford, a petroleum reservoir engineer, to enable him to determine net effective acre feet of productive sand.

"APPLING (SEGMENT 5, 7500′) FIELD

"In my opinion, the Appling (Segment 5, 7500′) Field is a reservoir originally containing 435 productive surface acres, of which Alcoa et al have under lease approximately 385 acres. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Ken neth B. Ford.

"APPLING (SEGMENT 6, 7500′) FIELD

"In my opinion, the Appling (Segment 6, 7500′) Field is a reservoir originally containing 352 productive surface acres, of which approximately 310 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600′) FIELD

"In my opinion, the Appling (Segment 6, 7600′) Field is a reservoir originally containing 485 productive surface acres, of which 443 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600',
LOWER) FIELD

"In my opinion the Appling (Segment 6, 7600', Lower) Field is a reservoir originally containing 525 productive surface acres, of which 481 are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford."

The Harris affidavit no. 1 as well as the affidavits heretofore discussed vividly portray the probable imminent evils contemplated in Section 1, Article 6008, supra, which would have resulted had the Commission elected to continue the normal procedure of determining the monthly allowable for each prorated gas reservoir in the Appling Field area. The Commission was confronted with the necessity of determining whether to continue utilization of the procedures set out in Statewide Rule 31(c) and (e) or whether to discard the normal procedure and adopt in its place a method which under the undisputed evidence would adequately protect correlative rights and a method "deemed necessary to restrict the production of gas to an amount equal to market demand as is required of the Commission by the statutes." See the Exception in Rule 31. This was a special condition and the market demand order relates to the five Appling Field reservoirs. The Railroad Commission expressly found and recited in the order under attack that:

"From evidence adduced at said hearing, it was apparent to the Commission that procedure in use for determining the market demand for gas from the mentioned fields provided a means by which an operator could distort the market determination to such an extent that Commission proration and ratable take orders were rendered completely ineffective; that the resulting

> injury to correlative rights could be adjusted by modifying the market demand procedure; that the suggested alteration in the procedure for determination of reasonable market demand as modified by the Commission would reduce the ability to manipulate and distort the reasonable market demand determination for the fields."

This Court should bear in mnd that the order under attack was not entered as the result of our holding in the case of Railroad Commission of Texas v. Aluminum Company of America, supra. The market demand order is in no sense an attempt to circumvent our decision. The plaintiffs' claim that such is the purpose of the order is wholly unfounded. The Railroad Commission order in the Aluminum Company case was effective January 30, 1961, whereas the Railroad Commission order in the present case was issued effective December 1, 1964. The order under attack is based on occurrences after January 30, 1961. The Railroad Commission order in Aluminum was entered on the basis of facts and conditions which existed on January 30, 1961, when the order became effective. When the order under attack was entered many material changes had occurred between January 30, 1961, and May, 1964. The prior order did not and could not adjudicate conditions existing on December 1, 1964, or the valdity of an order effective on that date.

The hearing which preceded the adoption of the order under attack was held on December 5 and 6, 1963. On November 4, 1964, the Commission ordered its adoption, effective December 1, 1964. The Examiner, who conducted the hearing for the Railroad Commission, determined from an examination of the producers forecasts allowable schedules, production reports and well test reports filed with the Commission by operators of many wells on small tracts, that they were following the practice of filing producers

forecasts, combined with the forecasts of the other operators, causing the customary (Rule 31) Commission procedure for determining allowables to result in classification of wells located on larger tracts as limited capacity wells (wells unable to produce the allowable which would normally be assigned thereon), and the small tract wells received allowables for greater than the *share of reservoir allowable* they would have received pursuant to the ⅓ per well–⅔ acreage allocation formula in effect in the field.

The undisputed evidence conclusively establishes that in order to protect correlative rights, the Commission not only had the power under authority of the Legislature to adopt the order, but it would have been derelict in its duty if it had failed to so act. I think this case presents a state of facts which the Legislature intended for the Commission to adjust so as to ultimately give to each operator, small or large, his fair share of the gas in the reservoir. The condition here, so far as correlative rights are concerned, are analogous to the conditions described in the cases of Brown v. Humble Oil & Refining Company, 126 Tex. 296, 87 S.W.2d 1069, 1070, 101 A.L.R. 1393 (1935); Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73 (1939); Magnolia Petroleum Co. v. Railroad Commission, 128 Tex. 189, 96 S.W.2d 273 (1936); Railroad Commission of Texas v. Manziel, 361 S.W.2d 560, 93 A.L.R.2d 432 (Tex. 1962).

In these cases, the Court was concerned with the question of the extent the Legislature had clothed the Commission with the power to regulate oil and gas production under the Texas Conservation Statutes. In Corzelius v. Harrell, supra, this Court said:

> "The law under consideration states in detail the manner and method the Commission may follow in pro-

> rating and regulating the daily gas well production from each common reservoir. The Legislature recognized the difficulty of prorating and regulating the production of gas from a common reservoir. *To make sure that the Commission was not to be bound by any narrow, technical rules in carrying out the objects of this law, the Legislature was particular to give the Commission broad discretion in the exercise of its power under the provisions of this law.*" [Emphasis added.]

In Brown v. Humble, supra, on motion for rehearing, this Court emphasized the broad and liberal standards to be applied to the conservation orders of the Railroad Commission and stated that the duty is lodged with the Commission to make rules to carry out the mandates of the Legislature and to impartially enforce them. We further said that all rules and rulings of the Railroad Commission are presumed to be valid unless the contrary is made to appear.

These cases announce principles in keeping with repeated statutory declarations of the broad discretion vested in the Commission. See Section 22, Article 6008, supra. Another such statutory declaration is to be found in Article 6042, wherein it is provided:

> "Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity."

In the case of Railroad Commission v. Rowan Oil Co., 152 Tex. 439, 259 S.W.2d 173, 176 (1953), we said that:

> "All property is held subject to a valid exercise of the police power. That some operators will have a less

> profitable operation, be delayed in recovering their gas, or be in trouble with their creditors does not affect the Commission's duty to enforce conservation by preventing waste. Neither does it make the Commission's action arbitrary or confiscatory if correlative rights are protected."

As heretofore pointed out, Rule 31 itself expressly reserves the power of the Commission to make any modifications or adjustments that the Commission in its discretion deems necessary to prevent waste *or to protect correlative rights.*

The Manziel case, supra, was one brought by the Manziels attacking a Railroad Commission order on the grounds that it would cause waste, that it would result in the confiscation of the Manziels' property, that the permit was not necessary to protect the correlative rights of the Whelans and that the order was in violation of the Commission's own rules. The Manziels contended that the Railroad Commission's order authorizing the Whelans to drill a well at an irregular location was violative of Article 6029(4). The Commission took the position that it must have the authority to grant the location of water injection wells to prevent drainage and to protect correlative rights. Here the Commission was confronted with a situation where it had adopted no field-wide spacing rule for water injection wells, but had made special orders as to each operator desiring to flood. In Manziel, we upheld the order of the Commission, saying:

> "The Commission has two primary duties in the administration and control of our oil and gas industry. It must look to each field as a whole to determine what is necessary to prevent waste while at the same time countering this consideration with a view toward allowing each operator to recover his fair share of the oil

in place beneath his land. In carrying out these duties, there has devolved upon the Commission the power to promulgate rules, orders and regulations that control the industry, and such are issued pursuant to the police power of the state, and that power may invade the right of the owner of the land to the oil in place under his land as long as it is based on some justifying occasion, and is not exercised in an unreasonable or arbitrary manner. See Brown v. Humble Oil and Refining Co., 126 Tex. 269, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393 (1935)."

In view of these repeated judicial and statutory declarations of the broad powers and discretions vested in the Railroad Commission by the Legislature, it is inconceivable that this Court at this late date would hold that the Commission has *no power* to fix the Appling Field allowable in a manner that will result in reasonable individual well allocations and some degree of increased protection for the correlative rights of the Intervenor-Defendants.

I find no case which sustains the plaintiffs in their contention that the Railroad Commission has *no power* to consider the protection of correlative rights or to employ methods designed to see that each individual well gets its *fair share* of the total production from the common gas reservoir in fixing allowables. The Commission is not strictly limited to the clerical function of running up the mathematical total of the producers' forecasts in determining the field allowable. The Court seems to indicate that the Rudman case, supra, so holds. I have hurriedly examined the Rudman record and feel safe in saying that it does not. That case merely holds that the field allowable must be determined in advance of the month to which it is applicable and that it cannot be determined retroactively after the month has expired.

At this time I forego writing upon the question of whether or not the Commission's and the other defendants' motions for summary judgment should have been granted. I would, however, reverse the judgment of the trial court.

NORVELL and HAMILTON, JJ., dissent.

DISSENTING OPINION

HAMILTON, Justice.

I respectfully dissent. The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from an enforcement of Rule 31 prior to the amendment that is under attack here. According to Rule 31 before amendment the principal factor to be considered in determining reservoir market demand is the sum total of all gas which producers say they expected to produce the following month and submit on Producers' Forecasts.

What caused the rule to break down, resulting in the chaos described in the Court's opinion, was that producers of gas from small tracts (in most cases 1/10 of an acre) did not confine their forecasts to the volume of their own gas which they expected to produce the following month. In most of such cases a producer would say in effect that he had a sale for all the gas he could produce under the field proration formula, but in addition he could produce and sell more than ten times that much more gas belonging to his neighbors. By taking the sum total of such Producers' Forecasts the Commission was not considering the market demand for gas which the producers had available for sale under the field proration formula as established by Rule 5, but was taking into consideration the gas of other owners, which the producers had no right to offer for sale or to produce. It is evident that consideration of this factor could

not furnish any reasonable basis upon which the Commission could determine the true lawful market demand for gas to be produced from the reservoir under the existing regulations.

The Commission came to the conclusion that in considering and determining the market demand for gas to be produced from each reservoir that it should consider only so much of the Producers' Forecasts as would not exceed the amount of gas which producers could lawfully produce from the reservoir under the allocation formula set out in Rule 5. This is all that Rule 11, the amendment under attack here, seeks to accomplish. It adds another factor to be considered by the Commission in arriving at the lawful demand. It allows the Commission to determine market demand for the gas to be produced from the reservoir under regulation rather than for gas produced at full capacity of the wells.

The real question, then, before the Court is what gas does the Commission take into consideration in determining lawful market demand at its monthly hearings. Does it take into consideration gas to be produced at full capacity of the wells in each reservoir or gas to be produced from each reservoir under the field regulations then in existence? If we determine that the Commission is correct in considering only the gas that can be lawfully produced under the regulations already in existence at the time of its hearing, then the problem with which the Court struggles in its opinion never does arise.

In determining whether the Commission is correct in its approach to this problem we must bear in mind that before the Commission ever had any right to exercise the broad powers the Legislature granted it to prorate and regulate the production of gas it first had to be determined that the capacity of the wells to produce gas from the reservoir in

question exceeded the market demand for gas from such reservoir. This finding was made some years ago and the Commission proceeded as the statute directs by orders to promulgate rules and regulations governing the production of gas from each reservoir. These regulations established spacing rules and, for the reservoir in question, it established a 320-acre spacing unit rule with a proviso for exceptions to Rule 37, under which the Commission has granted 17 exceptions in order to prevent confiscation of gas. Then in order to prevent excess drainage from regular size units by these small units the Commission adopted Rule 5, which is the ⅓ - ⅔ proration formula, ⅔ of production based on acreage, and ⅓ on per well factor. It is this rule that automatically puts a limit on the maximum amount of gas which can be produced from each well, and consequently a limit on the maximum of production of gas from each reservoir.

It is only after all these things have been done by the Commission that it then at the direction of the Legislature has a hearing on or before the 20th of each month to determine the lawful market demand for gas to be produced from each reservoir for the following month. The lawful producing capacity of each reservoir has already been determined. The Legislature necessarily had in mind that this would have been done before the Commission was called upon to determine the lawful market demand. It necessarily follows that the Legislature, when it said "to determine the lawful market demand for gas to be produced", had in mind the gas to be produced under the regulations then in force.

All that Rule 11, the amendment under attack, does is to say that as to the Producers' Forecasts it will consider so much of the forecasts as does not exceed the amount which

the producer can lawfully produce under the regulations in force. If they do not exceed such amount, then the Commission will fix the market demand at the sum total of the Producers' Forecasts. If they do exceed such amount, then the Commission will fix the lawful market demand at the maximum which the producers could produce under the regulations.

It can be seen that the Commission is not arbitrarily fixing the market demand, but is fixing it in the light of all the facts and circumstances before it at the time it is called upon to make the determination. The Commission considers not only the nominations of purchasers and Producers' Forecasts, but also the supply of gas that may be lawfully produced from the reservoir. All these factors bear on the lawful or reasonable market demand the Legislature had in mind when it directed the Commission to determine the lawful market demand for gas to be produced from the reservoir.

This Court, in making its holding, says:

> "In adopting the order now in question the Commission has set an arbitrary limit on reasonable market demand for gas *from the reservoir* and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand * * *." (Emphasis mine.)

In the first place, the statute does not direct the Commission to determine the reasonable market demand for gas *from the reservoir*, but it is for the gas *to be produced* from the reservoir. This means a reservoir which is necessarily already under proration, or else the Commission would not be called upon by such statute to determine any market demand. Consequently, the market demand, with which we are concerned here, is for gas to be produced from

the reservoir under proration. The Court is holding as a matter of law that the Commission cannot consider the supply of gas as is limited by proration in determining market demand, and has stricken the order of the Commission, which in effect says that the Commission will consider nominations and Producers Forecasts, but only to the extent that they do not exceed the maximum amount that can be produced under proration, as fixed by the Commission. This is a strange holding, in view of the fact that the Commission would have no power or authority whatever, in a case where waste is not involved, to determine market demand, unless it did relate to correlative rights. Any such order of the Commission establishing the factors to be considered in determining lawful market demand would be without authority if it did not concern correlative rights. Section 1, Article 6008, is as follows:

> "Sec. 1 In recognition of past, present, and imminent evils occurring in the producing and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by *prohibiting waste and compelling ratable production.*" (Emphasis mine.)

By this provision and others the Legislature has said in no uncertain terms that the Commission may promulgate orders and rules only when they have some reasonable relation to the prohibition of waste or the compelling of ratable production among the owners of gas in a common reservoir. The Supreme Court of the United States, in Thompson v. Consolidated Gas Utilities Co., 300 U.S. 55, 57 S.Ct. 364, 371, 81 L.Ed. 510, in affirming the lower courts which had held invalid an order of the Texas Rail-

road Commission ostensibly issued under the authority of Article 6008, R.C.S., said this:

> "Proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."

The whole opinion of this Court shows that it misses the entire purpose and reason for the existence of Article 6008. The very basis of any power given the Railroad Commission is to prevent waste or to protect correlative rights. Consequently, in analyzing Section 12 of Article 6008, after the Commission has determined that facts exist which give it authority to proceed to prorate and regulate oil and gas production, then everything the Commission does thereafter under Section 12 has to be either related to correlative rights or waste. The Commission is given no authority to establish any rule or order which does not have some reasonable relation to one or the other. Consequently, when this Court says that Rule 11 which is under attack here is invalid because it has the effect of protecting correlative rights it is doing so in the face of the plain purposes and provisions of the statute.

The Court, in arriving at its holding, not only ignores the above-quoted Section 1 of Article 6008, but also ignores Section 22 of said article, which reads as follows:

> "Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

It is interesting to note how the opinion treats the provisions of Sections 1 and 22 as mere suggestions and

comes to the conclusion that the Legislature had no intention of giving the Commission the broad authority and discretion contained in the provisions of said sections. The Court reaches its conclusion through an analysis of Sections 10 and 11 of Artcle 6008, which read as follows:

> "Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:
>
> "(a) In the preventon of waste as 'waste' is defined herein;
>
> (b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.
>
> "Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.
>
> "The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservior, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

The Court, after noting the powers granted the Commission in Section 10 to regulate and prorate production

for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission", that potential production is in excess of reasonable market demand, it then makes this statement:

> "This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding."

That statement is just as true as it can be, but what the opinion fails to say is that the Commission did make that finding; it did become concerned with correlative rights; it did promulgate a proration order covering the reservoirs here involved, which is Rule 5, to protect correlative rights. Once the Commission made the finding that potential production is in excess of reasonable market demand all the broad powers and discretion conferred upon the Commission to prorate and regulate production of oil and gas came into effect. Yet the Court's opinion says that, because the Commission first had to make that finding, "It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22." It is difficult to see how the Court can conclude, from the reasons it gave, that the Legislature did not mean what it said.

I disagree with the Court's definition of "lawful market demand" as used in that part of the sentence in Section 12 as follows: "* * * shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *." The Court defines it as "reasonable market demand for lawful uses." It does mean that, but it means more in the context in which it is used. I would add to the Court's definition "and lawfully produced." As stated above, there was in effect at the time

the Commission promulgated the amendment now under attack a valid and subsisting proration order covering the reservoirs in question. This order is not under attack here and is still in force. Until set aside it has the effect of law. Section 16 of Article 6008 says: "It shall be unlawful for any person to produce gas from a gas well in violation of the valid orders of the Railroad Commission of Texas."

While the Court says that it does not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month and that the Commission may consider and give appropriate weight to all factors that are relevant to the determination of reasonable market demand, they are rather empty words. The Court holds that the Commission may not consider correlative rights as a factor in the determination of market demand. In view of this holding of the Court there is no way in which the Commission can protect correlative rights. If Woods Exploration Company and a small pipe line can destroy correlative rights in the reservoirs in question it is unthinkable what larger pipe lines can do to gas fields all over this state wherever there are small tract owners located.

The Court says in effect that the Legislature gave broad powers to protect correlative rights to the Commission throughout the statutes on oil and gas but took it away with one stroke of the pen when it wrote this one phrase "shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * * ." This in spite of the fact that the Legislature nowhere told the Commission what it must or must not consider in determining lawful market demand. The effect of this holding is to destroy, in so far as gas fields in which there are small tract owners are concerned, the power of the Commission to protect correlative rights.

This Court has said numerous times contrary to the present ruling that the Commission has broad powers in so prorating and regulating oil and gas production as to protect correlative rights. Railroad Commission v. Shell Oil Company, 380 S.W.2d 556, at 559; Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73; Atlantic Refining Co. v. Railroad Commission, 162 Tex. 274, 346 S.W.2d 801; Halbouty v. Railroad Commission, 163 Tex. 417, 357 S.W. 2d 364.

I would reverse the judgment of the trial court.

SMITH and NORVELL, JJ., join in this dissent.

RAILROAD COMMISSION OF TEXAS ET AL.,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA ET AL.,

Respondents.

No. A-9760.

Supreme Court of Texas.

May 27, 1964.

Rehearing Denied July 15, 1964.

CULVER, Justice.

Respondents, Aluminum Company of America, Crown Central Petroleum Corporation, Carl E. Siegesmund, and Sun Oil Company, (Alcoa et al.), in this suit attack and seek to set aside the Railroad Commission's order of April 24, 1961, allocating the allowable production of oil and gas in the Appling Field in Calhoun and Jackson Counties. This order prorates the production of gas on the basis of ⅓ per well and ⅔ on the acreage assigned to the well and prorates oil on a 50% per well and 50% acreage basis. The grounds of the attack are that this order results in and permits enormous drainage to town lot and other small tract wells from under respondents' lands and that this drainage will continue unless the Commision's order is set aside. Alcoa et al. assert that they own approximately 3,700 acres of the total productive area of the Middle Kopnicky reservoir and as of June 30, 1961, had 22 wells producing therefrom; that at the same time there were 30 town lot wells with total assigned area of 25 acres; that the average per well allowable for the small tracts is 43 times the average per acre allowable for standard unit tracts in the Middle Kopnicky. These allegations are proven without substantial dispute.

A number of intervenors aligned themselves with the Railroad Commission in urging that the order be upheld. The trial court adjudged that the order of the Commission was not supported by substantial evidence, was therefore null and void and enjoined its enforcement. The Court of Civil Appeals affirmed. 368 S.W.2d 818. We here reverse the judgments of the courts below and hold the Commission's order to be valid.

The Appling Field consists of 10 separate sands for the most part overlying one another. All of these sands produce gas and condensate with a few small oil reservoirs interspersed. The principal sand, known as the Middle Kopnicky, is the deepest producing sand and by far the thickest and most prolific reservoir. It contains 80% of the gas reserves in the entire area. The nine other sands are progressively higher and overlie the producing area of the Middle Kopnicky. The discovery well in the Appling Field was completed as a gas producer in the Middle Kopnicky in 1953. In 1956 the Commission for the first time adopted for this field the gas allocation formula of ⅓ per well and ⅔ per acreage. The order also provided for a 320-acre gas well spacing unit and a 40-acre oil well spacing unit. At that time several town lots or small tract wells had been drilled and were in production.

Thereafter and prior to January 19, 1960, the Commission promulgated at various times as the individual reservoirs were discovered, the same proration formula for each. No appeals were taken by Alcoa or by anyone else from any of these orders. In fact, the evidence shows that Alcoa during this period had at least once recommended that very same formula to the Commission for adoption.

On January 19, 1960, Alcoa et al., petitioned the Commission to hold a hearing and to revise the oil and gas allocation formulas for these reservoirs which the Commission had theretofore promulgated. After hearings were held

and the matter considered at length the Commission entered the order here under attack. It recited that the rules theretofore adopted should be revised and redrawn into one single order for all of the reservoirs and that all former orders were superseded and rescinded. By the terms of that order, however, the Commission refused to modify or change in any way the proration order which had first been promulgated in 1956 or any of the eight subsequent special field orders and expressly continued in force the ⅓-⅔ formula. It may be noted here that the amount of oil reserves in the field is negligible and the parties have concerned themselves, therefore, almost exclusively with the matter of the gas reservoirs and the formula applicable thereto.

The principal point argued by the Commission and its aligned intervenors is that the evidence shows as a matter of law that Alcoa et al. were barred by unreasonable delay, laches and estoppel from seeking to set aside and revoke the order continuing the ⅓-⅔ allocation formula for gas production, and that the courts below erred in holding that these defenses are not applicable to suits attacking proration orders of the Railroad Commission. Their position is based primarily on the statement in our decision commonly referred to as the Normanna[1] case as follows:

> "We are in agreement with the reasoning of the courts in the Humble and Standard Oil Company cases in holding that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

While this staement is properly to be regarded as dictum since it was not necessary to the decision in the case, nevertheless it was said deliberately, to put the Commission

[1] Atlantic Refining Co. v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801, 811.

and the industry as a whole on notice that the holding therein did not require the overturning of proration formulas that had been in effect in other fields for years where operators had drilled and completed wells at great expense in reliance on those formulas and where conditions had become stabilized. Otherwise, not only would confusion and serious injustice result in many instances, but an intolerable burden would be cast upon the Commission. Thousands of producing wells have been drilled on small tracts in Texas oil fields as exceptions to Rule 37 in hundreds of fields in which the ⅓-⅔ formula has been adopted and which tracts have produced far more hydrocarbons than underlaid those tracts originally. There are said to be more than 300 productive gas fields in the State which are now and have been currently operating under this formula.

The question decided in Normanna was for the first time squarely presented to this Court. We there held that the ⅓-⅔ proration formula promulgated by the Commission for the Normanna Field was invalid because it allowed a well on a .3-acre tract to produce gas at a rate many times greater per acre than a well on a standard spacing unit. It did not come close to ratable production nor did it afford each operator in the field an opportunity to produce his fair share of the gas from the reservoir. On the contrary it would result in the uncompensated drainage of a tremendous quantity of gas and condensate from other leases and tracts in that field to the small tract upon which the defendant had drilled its well.

The theory of the Normanna decision as expressed in the quoted language is that its holding is to be applied prospectively and not retrospectively. This prospective application of Normanna is in harmony with the statute[2] which authorizes appeals from any rule, regulation or order promulgated by the Commission. Although this statute fixes no time

[2] Vernon's Ann.Civ.Stat., Art. 6049c. § 8.

limit for an appeal, yet by providing that such suits shall be advanced for trial and be determined as expeditiously as possible, and that no postponement or continuance shall be granted except for reasons deemed imperative, it clearly evidences a legislative intent that those suits must be brought within a reasonable time. Dunbar v. Fuller, Tex.Civ.App., 253 S.W.2d 684, writ ref.; Midas Oil Co. v. Sanolind Oil Co., 142 Tex. 417, 179 S.W.2d 243; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W.2d 369. In the last case where no appellate steps were taken for a period of seven months, the appeal was held to be untimely, even though the Board order may not have been reasonably supported by substantial evidence and had the appellees proceeded with diligence, they might have been enabled to obtain the relief sought.

Alcoa insists that the decisions such as Midas Oil Co. v. Stanolind have no application to the problem here presented because there is a basic difference between a Commission order establishing a field-wide allocation rule and and order granting an exception to a Rule 37 permit in that the granting of the permit fixes a vested right while the allocation orders do not.. We concede that distinction, but nevertheless we believe the law, as announced therein, is pertinent to the facts here.

Unquestionably the Commission's power to regulate oil and gas production in the interest of conservation and protection of correlative rights in a continuing one and its orders are subject to change or modification where conditions have changed materialy, new and unforeseen problems arise or mistakes are discovered. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S.W.2d 1106; Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W.2d 824, writ ref. n. r. e. It is equally true that no land owner or operator acquires any vested

right to continue to produce the same amount of oil or gas during the life of such well as was fixed by the proration schedule in force at the time he drilled his well. The regulation of the production of oil and gas is a valid exercise of the state police power. Texas Trading Co. v. Stanolind Oil & Gas Co., Tex.Civ.App., 161 S.W.2d 1046; Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L.Ed. 1368.

What we do say is, however, that in appealing from any order of the Railroad Commission one must proceed with reasonable diligence. The course pursued by Alcoa in this case in moving for a modification of the long-standing ⅓-⅔ formula and then taking an appeal from a denial of that motion for all practical purposes, and so far as the interests of the parties are concerned, differs in no material respect from a present attempt to appeal from the original 1956 order and the ones that followed. Alcoa had the right to seek a revision of these orders, but only upon a showing of changed conditions and a resultant necessity therefor.

There have been no material changes nor have unforeseen problems arisen, affecting proration in the Appling Field, that in our opinion would compel the Railroad Commission to modify or rescind the proration orders promulgated prior to January 19, 1960. As pointed out above, the effect of the Commission's order complained of here was merely the refusal to set aside the orders that had theretofore been adopted. At the time of the first field proration order in 1956 it appears that five wells had been drilled in the area on small tracts. This drilling under the Rule 37 exception continued until thirty wells had been brought into production prior to May 18, 1959, and others had been completed before Alcoa filed its application before the Board. The cost of drilling per well ranged from ninety to two hundred thou-

sand dolars. From the testimony it appears that Alcoa could reasonably have concluded in 1956 that many town-lot tracts lay within the proven territory. Alcoa knew that as a matter of law each town-lot owner, or at least many of them, would in all probability be entitled to one well as exceptions to Rule 37.

Beginning in 1954 there were negotiations between Alcoa et al. and some of the small-tract owners concerning the matter of pooling and unitization. There is evidence to the effect that Alcoa and its associates refused some such offers from small-tract owners. There is evidence that the Carancahua Townsite in 1955 was surrounded by four or five wells that had been drilled by Alcoa which indicated that the townsite was a proven potential area for production and that the area was being drained by the Alcoa wells at that time.

Likewise there were negotiations between the intervenor, Sun Oil Company, and some town-lot owners in the Port Alto Subdivision looking to unitization and pooling agreements. These two town-lot areas spread over about 150 acres and were divided into more than 200 lots. All of these facts undoubtedly were fully known to Alcoa and the other respondents at the time of the promulgation of the first order in 1956 and they must have fully appreciated the almost certain probability of the drainage that would necessarily follow from completions on town lots in the productive area.

It is true that a number of these townlot wells owned by some of the petitioner-intervenors have been drilled and brought into production subsequently to January 19, 1960, when Alcoa et al, first applied to the Commission for a revision and modification of the existing proration orders. In fact all of the wells of two of these intervenors had been

so drilled. Three of these intervenors had completed all of their wells earlier. But the fact that some of these wells were drilled after they were put on notice of Alcoa's application is not material to a solution of the problem here. It could not affect adversely those operators whose wells were drilled earlier. We are dealing here with a field-wide rule. Whether or not there is any authority vested in the Commission to apply exceptions to a field-wide rule in some cases, that relief is not here sought by Alcoa. They seek to strike down the order as applicable to the entire field.

In Standard Oil Co. v. Railroad Commission, Tex.Civ. App., 215 S.W.2d 633, n.r.e., Standard filed its application with the Commission seeking a modification of the Yates Field proration formula which had remained in effect without substantial change for nearly nine years theretofore. On page 638 of that opinion the Court points out:

> "* * * From the very nature of a proration formula, and the magnitude of the interests therein, both public and private, it ineluctably follows that the Commission has the affirmative right, when challenged in an appropriate judicial proceeding, to have its validity established, and the continuing uncertainty removed, which would result from the untrammeled right of the challenging party, from whatever cause, to bring its validity (except for changed conditions) again in issue. * * *"

From that premise Alcoa et al. argue that laches and delay do not apply to field-wide proration orders in that, they say, the Court holds that Standard had the "untrammeled right" to attack the order on any grounds and at any time they saw fit. We do not agree with that argument. Standard's principal contention in that cause was that having moved for a non-suit it was entitled as a matter of law to a dismissal of the entire suit without prejudice. The Court held, however, that the Commission having prayed that these orders be sustained, it was entitled to a judicial

determination of their validity to set at rest any uncertainty in that respect. The Court is not saying, as we construe its language, that Standard after long delay does have the untrammeled right to put in issue the validity of the proration formula absent changed conditions.

Alcoa et al. contend that there is no evidence to show that any well owner on any small tract in this field has failed to obtain already from his allotted production the entire cost of his drilling and maintenance operations, together with some profit, and therefore it would be wholly unfair and unjust to permit a continuation of drainage from their properties which has up to the present time and will in the future result in a total loss to them of gas and condensate to the value of several million dollars. Even this argument, persuasive as it is, does not convince us that this Court should interfere with the administration by the Railroad Commission of the production from this field where small tract drilling has been conducted and large sums expended in reliance on the formula that had been in force without objection for a period of four years.

There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business.

For the reasons above expressed we uphold the Railroad Commission's order of April 24, 1961. The judgments of the trial court and the Court of Civil Appeals are reversed and judgment here rendered that respondents take nothing.

CLAIRE BENZ-STODDARD ET AL.,

Petitioner,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

No. A-9137

Supreme Court of Texas.

May 8, 1963.

Rehearing Denied June 12, 1963.

HAMILTON, Justice.

This is a suit brought by Aluminum Company of America to cancel a Railroad Commission order granting a Rule 37 exception permit to prevent confiscation of the minerals underlying Claire Benz-Stoddard's .115-acre town lot. The trial court sustained special exceptions to the petition and, when Aluminum Company refused to amend, dismissed on the ground that the petition did not state a cause of action for cancellation. The Court of Civil Appeals reversed and remanded. Tex.Civ.App., 357 S.W.2d 809. Claire-Benz-Stoddard and the Railroad Commission are petitioners.

We reverse the judgment of the Court of Civil Appeals and affirm the judgment of the trial court.

Since this case comes to us on a special exception in the nature of a general demurrer we must accept respondent's allegations as true. The allegations are as follows:

Underlying Claire Benz-Stoddard's .115-acre tract are ten vertically separated gas reservoirs, or horizons, among which there is no communication of gas. Multiple comple-

tion techniques make it possible to produce gas from as many as six of these reservoirs though only one well bore. The Commission's order granted Claire Benz-Stoddard's request for permit to drill one well and to make multiple completions in as many reservoirs as were productive. The order recites that the permit is granted to prevent confiscation and/or waste", but the parties agree that there was no issue of waste in this case, only of confiscation. Respondent alleged that because of the proration order in effect at this field at the time the permit was granted (⅓ of the allowable allocated on a per well basis and ⅔ allocated on a per acre basis), a single completion well during its life would make it possible for petitioner to recover more than her equivalent of the minerals in place in all ten reservoirs under her land, thus would fully protect her against confiscation. Respondent further alleged that petitioner has in fact made triple completions and has already recovered more than seven times the gas in place beneath her tract in all ten reservoirs, 84% of which has been drained from respondent's portion. Respondent did not allege that petitioner has access to any one of the ten reservoirs by means of another well on another tract. Respondent alleged that this was a voluntary subdivision but expressly waived and abandoned that allegation before the trial court.

The Court of Civil Appeals held that petitioner was entitled to an opportunity to recover the equivalent of her share in the ten reservoirs beneath her tract — not the specific minerals—and that since under the proration order in effect at the time the permit was granted she could with a completion in only one reservoir recover more than enough gas to make up her equivalent in all ten reservoirs, she was as a matter of law not entitled to multiple completions. In support of this holding the Court of Civil Appeals cites Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d

73; Atlantic Refining Co. v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801; Railroad Commission of Texas v. Williams, Tex., 356 S.W.2d. 131; and Halbouty v. Darsey, 326 S.W.2d 528 (Tex.Civ.App.1959), writ ref'd n. r. e.

Petitioner Claire Benz-Stoddard contends that it is immaterial that she could with one completion recover from a single reservoir an equivalent of her fair share of the gas in all ten reservoirs lying beneath her tract. She further argues that if allowing multiple completions will cause unreasonable drainage of respondent's lands, respondent has recourse by way of attack on the proration order, not by attack on the exception permit.

Respondent argues that our decisions in Williams, supra, and Coloma Oil & Gas Corp. v. Railroad Commission of Texas, Tex., 358 S.W.2d 566, compel us to hold that once it has been shown that a single completion will afford petitioner an opportunity to recover her fair share of the gas in all ten reservoirs, there is not as matter of law substantial evidence to support a finding of necessity for multiple completions to prevent confiscation. In other words, respondent contends the Commission must treat petitioner's fair share of the gas in ten separate reservoirs as if it were all contained in one reservoir. Respondent does not contend that Claire Benz-Stoddard is not entitled to a "first well", only that she is not entitled to completions in more than one reservoir.

The question before us is: Where a tract of land overlies several vertically separated gas reservoirs, shall the Railroad Commission, in applying the exception to Rule 37, treat the several reservoirs separately or as one? We hold that the Railroad Commission was correct in treating them separately and therefore the facts alleged by respondent do not state a cause of action for cancellation of the permit allowing multiple completions.

Petitioner Claire Benz-Stoddard has mineral property in ten separate reservoirs and is entitled to a Rule 37 exception permit in each reservoir if she has shown that confiscation will result. We must presume that the Railroad Commission has found that confiscation would result. Article 6049c, Vernon's Ann.Tex. St. Respondent does not allege that there will be no confiscation in each reservoir when considered separately.

The Williams and Coloma cases, supra, upon which the Court of Civil Appeals relies, do not support respondent's contention here. We wish to point out that in each of those cases this court held in effect that the applicant for the exception to Rule 37 already had a well within the same reservoir and drainage area as the second tract for which the permit was sought, and that the well already in existence could produce and drain from the second tract the oil or the equivalent of the oil in place under such tract, and that the second well was not necessary to prevent confiscation of applicant's oil in the common reservoir. The distinction is simple. In each of those cases there was one common reservoir, while in the case before us there are several separate reservoirs.

We think that Article 6008, V.A.T.S., which authorizes the Railroad Commission to regulate the production of gas contemplates that the Railroad Commission will treat reservoirs of gas underlying the same tract of land separately. Section 4(a), reads as follows:

> "If oil and/or gas be produced through different strings or casing set in the same well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well."

We think this section authorizes the Railroad Commission to treat a completion in each reservoir as a "first well". In Section 12, Article 6008, we find this language:

> "The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced *from the reservoir*, * * *." (Emphasis added.)

The granting or denial of a Rule 37 exception permit in a "first well" situation has never been held to depend upon the quantity of gas which may be allowed to be produced from the well or whether the granting of such permit may result in drainage from adjoining owners. See Atlantic Refining Co. v. Railroad Commission of Texas, 330 S.W.2d 494 (Tex.Civ.App.1959), writ ref'd n.r.e.; Halbouty v. Darsey, 326 S.W.2d 528 (Tex.Civ.App.1959), writ ref'd n.r.e.; Foster v. Railroad Commission, 326 S.W.2d 533 (Tex. Civ.App.1959), writ ref'd n.r.e.

We realize that the granting by the Railroad Commission of the multiple completion order under the general proration order in effect in the field does create a situation in which grave injustice may be done the respondent. However, we do not feel that the solution of the problem lies in denying the application of the exception to Rule 37 to each separate reservoir underlying petitioner's land. In the case of Brown v. Humble Oil & Refining Company, 126 Tex. 296, 83 S.W.2d 935, at page 944, this court, in discussing the validity of Rule 37 said:

> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. * * * but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. * * *

"• • • This right to control the rate of flow in order to prevent waste also enables the commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage. In this way the commission, by controlling the oil stored in the common reservoir, is enabled to carry out the dominant purpose of preventing waste, and, at the same time, permit each owner to enjoy the opportunity fully to realize upon his estate by developing and recovering his oil and gas. We therefore hold that the Railroad Commission has the power, under the conservation statutes, to promulgate a spacing rule, as was done, regulating the drilling of oil wells, and to provide for an exception to the rule to protect vested rights and to prevent waste; and the exception to the rule is not too uncertain or indefinite so as to render the rule invalid. No unreasonable hardships need result, if the rule is faithfully and impartially applied by those authorized by law to administer it."

It can be seen that the very validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of the gas that no unreasonable hardship need result from its application. This court reiterated this principle in Atlantic Refining Company v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801, and Halbouty v. Railroad Commission of Texas, Tex., 357 S.W.2d 364.

We hold, therefore, that since the Commission is authorized to treat each completion in a separate reservoir as a separate well, it may grant multiple completions in each reservoir in which it finds there will be confiscation. The allegation that under the existing proration order petitioner will recover more gas from her land through one completion than underlies her land in all the reservoirs does not amount to a denial of the presumed finding by the Commission that there will be confiscation in each reservoir.

We therefore reverse the judgment of the Court of Civil Appeals and affirm that of the trial court dismissing respondent's cause of action.

Art. 6008. Production and use of natural gas

Declaration of policy

Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

Definitions

Sec. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article to wit:

(a) "Commission" means the Railroad Commission of Texas;

(b) "Person" means any natural person, corporation association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

(c) The term "Common Reservoir" as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

* * *
* * *

Commission to make and enforce rules and regulations

Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

(6) To require records to be kept and reports made.

(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits,[1] or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law.

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[1] So in enrolled bill. Session Laws duplicate words "or permission when the issuance of such permits."

Commission to prorate and regulate daily production

Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:

(a) In the prevention of waste as "waste" is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

Commission to exercise authority, when

Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

Determination of status of gas production; proration and regulation

Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs

in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, § 1.

Factors in determining daily allowable production

Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily produc-

ing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

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Discretion of Commission

Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

Penalty and suits to enforce

Sec. 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One Thousand Dollars ($1,000) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County

where the violation occurred by the Attorney General or by the County or District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may been enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

Appeals to courts

Sec. 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1712~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN LEROY JEFFERS
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Houston, Texas 77002

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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In The

Supreme Court of the United States

October Term, 1970

No. .....

Aluminum Company of America, et al,
Petitioners,

v.

Woods Exploration & Producing Company, Inc., et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The trial court in this antitrust treble damage action delivered two opinions which are involved in this petition. The first, *Woods Exploration & Producing Co., Inc.*, v. *Aluminum Company of America*, 284 F. Supp. 582 (S. D. Tex. 1968), granted a partial summary judgment to Petitioners (Defendants) on a cause of action based on natural gas production allowables claimed to have been fixed too low by the state government agency under the state statutory regulatory scheme because of Petitioners' representations to it. Appendix p. 1.[1] The second, *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 304 F. Supp. 845 (S. D. Tex. 1969), rendered

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[1] Because of the length of the opinions below and related matters a separate Appendix has been prepared pursuant to Rule 23(i) of this Court.

judgment for Petitioners on the remainder of the case. Appendix p. 25. The United States Court of Appeals for the Fifth Circuit reversed in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* Nos. 28763 and 29487, Slip Opinion dated January 5, 1971, 1971 CCH Trade Cases ¶ 73,422.[2] Appendix p. 38. Rehearing was denied per curiam by the Court of Appeals on March 17, 1971, Nos. 28763 and 29487, Slip Opinion dated March 17, 1971. Appendix p. 96.

Although not strictly "companion cases", three decisions of the Supreme Court of Texas are an integral part of the controversy between the parties and are keys to determining the errors in the grounds of the judgment of the Court of Appeals. *Railroad Commission* v. *Woods Exploration & Producing Co., Inc.,* 405 S.W.2d 313 (Tex. 1966), Appendix p. 97; *Rauroad Commission* v. *Aluminum Company of America,* 380 S.W.2d 599 (Tex. 1964), Appendix p. 131; *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W.2d 94 (Tex. 1963), Appendix p. 140.

GROUNDS OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit from which this petition is brought was issued on January 5, 1971. A petition for rehearing and for rehearing en banc was denied on March 17, 1971. No extension of time for the filing of this petition has been sought. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1254(1).

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[2] No. 28763 involves an injunction against Respondents' proceeding to relitigate this case in state court after entry of final judgment in the federal court. Separate appeals on the injunction and the merits were taken by Respondents and consolidated by the Court of Appeals. Petitioners seek no review in No. 28763.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the antitrust laws of the United States provide a treble damage recovery for injury alleged to have resulted from limitations placed upon Plaintiffs' production of natural gas from a Texas natural gas field where the limitation upon such production is imposed by orders of the Railroad Commission of Texas in the exercise of its lawful governmental authority to regulate natural gas production in Texas.

2. Whether the antitrust laws of the United States provide a treble damage recovery on allegations that the Defendants, joint owners of the major portion of a Texas natural gas field, in combination furnished false information to the Railroad Commission of Texas to procure orders from the Commission which would restrict the production of Plaintiffs, when the Plaintiffs sought no relief from the Commission, the Commission in fact ignored the allegedly false information and had full knowledge of the conditions and results of its regulations in the natural gas field involved, and the Plaintiff produced all of the gas from the field which the Commission permitted Plaintiff to produce.

3. Whether a single, small natural gas field in Texas may be determined as a matter of law to be a relevant geographic market for determining the existence of a monopoly, conspiracy to monopolize or attempt to monopolize under Section 2 of the Sherman Act, 15 U.S.C. §2, where all of the evidence is undisputed that the gas produced from the field is not marketed in the field but is marketed in another and much larger area in competition with quantities of gas from other fields vastly exceeding the amount produced from the field involved.

4. Whether reinstatement in an antitrust treble damage action of the verdict findings on liability issues and

damages to the Plaintiff as final on the evidence admitted before the jury as to *part of the case* and remanding for separate trial on the liability and damage issues on *two other parts of the case* is impermissible procedure denying the Defendants a jury trial of liability and damage issues *on the whole case* when:

A. The liability and damage issues were submitted by the trial court *as being on the whole case* but the Court of Appeals has reinstated the jury findings as final as to *one evidentiary part of the case* and reversed and remanded *two other evidentiary parts of the case* for separate trial on both liability and damage issues.

B. The *first part* to be tried was covered by a now reversed and remanded partial summary judgment granted before trial on gas production allowables allotted Plaintiffs by the state regulatory agency allegedly influenced by Defendants' representations to the agency which resulted in exclusion at trial of evidence of judicially binding fact findings by the state courts of drainage by Plaintiffs of vast quaitities of Defendants' gas so that such evidence was not before the jury in arriving at the damage findings now reinstated as final.

C. The *second part of the case* remanded for separate trial relates to a liquid extraction plant Plaintiffs desired to build as entry into a new business for which there was no evidence of their preparedness to enter beyond a purported contract which the jury found to be a forged instrument and which extraction plant Plaintiff never alleged as a part of the case until more than four years after the failure of the plant plans.

STATUTES INVOLVED

Plaintiffs-Respondents brought this action under Sections 1 and 2 of the Sherman Act 15 U.S.C. § § 1 and 2;

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

and Section 4 of the Clayton Act, 15 U.S.C.§15;

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Other provisions and statutes involved are Section 4B of the Clayton Act, 15 U.S.C. § 15b;

> "Any action to enforce any cause of action under Section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued";

and Art. 6008, Tex. Rev. Civ. Stat. Ann., governing regulation of production of natural gas by the Railroad Commission of Texas. Pertinent provisions of this Article are printed at Appendix p. 147.

STATEMENT OF THE CASE

This civil antitrust treble damage case revolves around the operations of the Petitioners-Defendants[3] and Respondents-Plaintiffs[4] in a single natural gas field located on the middle coast of Texas adjacent to the Gulf of Mexico. The field in question, known as the Appling Field, comprises approximately 4,000 acres on the earth's surface. The general area of the Field is rural rice and cattle land. Near the geographic center of the Appling Field, however, there is a small area which, many years prior to the discovery of gas in the Field, was subdivided into small town lots of small fractions of an acre, most of which are only 50 by 100 feet in dimension. This town lot area is known as the Carancahua Beach Townsite. Although the townsite was never actually developed as such, the numerous lots were sold to various persons.

Under Texas law and regulations of the Railroad Commission, the governmental body to which the Texas legislature has delegated the authority to regulate oil and gas production, a gas well may not ordinarily be drilled on a tract less than 320 acres. However, certain exceptions to this statewide spacing rule are granted by the regulatory agency where the surface has been divided into smaller tracts prior to oil or gas discovery in a particular area. When such an exception is granted a permit is issued by the agency to drill a well on a tract smaller in size than

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[3] Petitioners are Aluminum Company of America (Alcoa), its wholly owned subsidiary, Lavaca Pipeline Company (Lavaca), and Crown Central Petroleum Corporation (Crown).

[4] Respondents are Woods Exploration & Producing Co., Inc., (Woods Exploration), Stanley C. Woods (Woods), the owner of Woods Exploration, and Southeastern Pipeline Company (Southeastern), a corporation owned by Woods and his wife. Stanley C. Woods and the Exploration & Producing Co. are collectively referred to as Woods respondents.

required by the statewide spacing rule. This is what occurred in the Appling Field. Petitioners were conducting operations on normal, large tracts while Respondents were drilling wells in and producing gas from the small town lots in the Carancahua Beach Townsite.

The salient fact which should be kept in the forefront is that natural gas is fugitive in nature, i.e., it does not remain in one place in a reservoir once the reservoir has been tapped. It flows or migrates from beneath the land where it was originally in place to the nearest escape to the surface via a well. Thus a well on a small tract can drain gas from surrounding acreage without regard to the amount of gas originally in place beneath the surface of that tract.

In 1949 Alcoa and Crown entered into normal oil and gas industry joint operation arrangements covering an area in which both owned interests including the territory which subsequently became known as the Appling Field. Thereafter, based upon geological data prepared by Crown engineers, Alcoa conducted seismic explorations in the Appling Field and confirmed the desirability of the area as a drilling prospect. Alcoa then obtained leases from F. E. Appling, a large land owner in the area, and engaged him to obtain oil and gas leases from other landowners. Appling retained the usual royalty interests in the leases of his own property and also an overriding royalty interest in the leases of other property obtained by him for Alcoa. The discovery well in the Appling Field was drilled jointly by Alcoa and Crown under their joint operating agreement in 1954. Thereafter, Alcoa and Crown proceeded to develop the field. Once the potential of the area was thus proven, the State of Texas held lease sales on the submerged lands of the State beneath Lavaca Bay within the Field. Alcoa, on its own and without participation by Crown, paid the

State of Texas over $1,000,000 for leases in Lavaca Bay which lay within the productive area. By the time of the first activity of drilling on the small town lots in the Carancahua Beach Townsite in 1957, Alcoa for its own account, and Alcoa and Crown for their joint account, had approximately 85 percent of the 4,000 acre surface of the Appling Field under lease.

Alcoa caused its wholly-owned subsidiary, Lavaca Pipeline Company, to transport gas from the surrounding area to its aluminum smelter located at Point Comfort, Texas, where the gas was, at least partially, consumed as plant fuel. Lavaca constructed a pipeline into the Appling Field for the sole purpose of transporting Alcoa's gas and the gas of its joint interest owners to Point Comfort. At no time did Lavaca purchase gas from anyone in the Appling Field nor did it transport gas belonging to anyone other than Alcoa, Crown and Pocantico, another joint interest owner which is not a party to this suit.

In 1959, for the first time, Respondent Woods became interested in the Appling Field. He was aware of the entire situation as it stood at that time. Woods obtained leases on a number of town lots in the Carancahua Beach Townsite, each of which was approximately 50 by 100 feet in dimension.

About the time of the advent upon the Appling Field scene of Woods, Alcoa, Crown and Pocantico began to seek the protection of the Railroad Commission of Texas and the courts of the State in an effort to protect their property by preventing massive drainage of gas from beneath their leases by wells drilled on the 50 by 100 feet town lots by Respondents and others. The course of this litigation is set forth in some detail in the opinions below and is completely evidenced by the decisions of the Texas courts in cases between these same parties involving this same gas

field set forth in the Appendix. In this litigation, the Texas courts found as a fact that Respondents had drained away and confiscated huge quantities of gas from the Appling Field lands of Alcoa and Crown.

Benz-Stoddard v. *Aluminum Co. of America,* supra (Appendix p. 140), found such drainage but nevertheless permitted Woods and others to make multiple completions in different gas bearing sands located at different levels by permitting completions at such different levels within the same well. *Railroad Commission* v. *Aluminum Co. of America,* supra (Appendix p. 131), found that the Railroad Commission's allocation formula under which it was prorating the monthly gas production allowable fixed by it for the Appling Field among the various wells in that field on the basis of one-third on a per well allotment and two-thirds on a per acreage allotment resulted in the drainage by Woods Respondents of tremendous amounts of Alcoa's and Crown's gas and that such would be unlawful confiscation but for the fact Alcoa and Crown were held barred by laches from attacking it. *Railroad Commission* v. *Woods Exploration & Producing Co.,* supra (Appendix p. 97), found that the vast drainage of Alcoa's and Crown's gas in the Appling Field by Woods previously found in the earlier cases had not only been continued but had also been substantially aggravated but that the Commission's attempt to reduce this drainage by limiting gas production allowables to maximum well productive capacity was not permissible because the statute required the allowables to be fixed on the basis of market demand.

Woods formed Southeastern Pipeline Company to transport gas from the Woods' wells in the Appling Field to the pipeline of Tennessee Gas (now Tenneco) and successfully completed that line and began production and transportation of gas from the Woods' wells on January 1, 1961.

Thereafter, the Woods Respondents produced from such wells all of the gas which they were permitted to produce by the Texas Railroad Commission and in fact more than the gas production allowables granted them permitted. Indeed, Respondents' town lot wells exhausted all of the gas which they were economically and physically able to produce by the just described drainage of surrounding large tracts of Alcoa and Crown. All of this gas was sold to Southeastern which transported it to the Tenneco line which further transmitted it to Southeastern's customer, Bayou Hydrocarbons Company, in Houston, Texas. In this transaction, Southeastern experienced a sizeable profit.

Neither the sale of gas by the Woods Respondents to Southeastern, the sale by Southeastern to Bayou Hydrocarbons, nor the sale by Alcoa, Crown and Pocantico to Houston Pipeline Company was an interstate sale. All such sales were intrastate sales outside the jurisdiction of the Federal Power Commission.

Southeastern purchased no gas in the Appling Field other than that of Woods. Lavaca purchased no gas in the Appling Field. It merely transported the gas owned by Alcoa, Crown and Pocantico to Point Comfort for plant fuel and for processing and sale to Houston Pipeline Company by its various owners.

At the time this suit was originally filed in December, 1962, and up until the filing of the Second Amended Complaint, Respondents made no complaint of any injury other than that claimed to have resulted from the limitations imposed upon the production from the Woods Respondents' wells by the monthly production allowable orders of the Railroad Commission of Texas.

The sole original claim of Respondents in the original complaint in this case was that the amounts of gas which

the Railroad Commission permitted Respondents to produce from the Appling Field were reduced by the conspiratorial conduct of Petitioners inducing the regulatory agency to grant reduced allowables. The allegation was that the Railroad Commission employs a somewhat mechanical process in determining the total production from a gas field which will be allowed in a given month. This amount of production is called the field "allowable." Respondents alleged that the monthly field allowable is determined simply by taking the total of the monthly forecasts of production filed by each producer in the field. Such forecasts are known as producers' forecasts or "nominations". Respondents claimed that Alcoa and Crown falsely understated their nominations to the Railroad Commission to cause a smaller field allowable to result so that the Woods wells would receive a smaller well allowable and thus would be permitted to produce less gas than if Alcoa and Crown had nominated the amount of gas which they actually produced and sold. Respondents made no complaint to the Railroad Commission about the alleged undernominations and sought none of the statutory remedies available there but the Commission had full knowledge of the controversy between Petitioners and Respondents and of all of the production facts and facts of drainage by Respondents of Petitioners' gas which were fully developed in the previously described litigation to which it was a party.

Alcoa and Crown moved for summary judgment based upon the rationale of the decisions of this court in *United States* v. *Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1937); *Parker* v. *Brown*, 317 U.S. 341 (1943); *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1960); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), that injury which results from governmental regulations, orders, or action is not compensable under the Sherman

and Clayton Acts and that joint action to bring about governmental action which favors some competitors over others is not unlawful although misleading or even false information is employed with the intent of obtaining the governmental action sought to the injury of competitors. The trial court granted partial summary judgment covering the claim based on alleged undernominations to the Railroad Commission to Petitioners of these grounds. *Woods Exploration & Producing Co., Inc.*, v. *Aluminum Company of America*, 284 F. Supp. 582, Appendix p. 1.

Thereafter, the trial court proceeded to try the case before a jury upon allegations which had been added for the first time to the second amended complaint filed October 20, 1965 that Petitioners harassed Woods in his operations, caused Southeastern to be required to build a segment of its pipeline needlessly, and prevented Respondents from consummating arrangements for construction of a plant to extract liquids from their gas. The transactions upon which these allegations are based occurred more than four years prior to their insertion into the Second Amended Complaint. The trial court did not submit to the jury any question as to damages based upon the failure of Respondents to construct a liquids extraction plant because the evidence merely showed that Respondents desired to enter but did not show that Respondents were sufficiently prepared to enter this new business to raise their desire to do so to the level of "business or property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. In addition, the trial court refused to admit into evidence the final and binding findings of the Texas courts or any other evidence that Respondents had drained away and confiscated large quantities of gas from Petitioners.

The case was submitted to the jury on special interrogatories. The jury found in answer to Question No. One that

Alcoa and Crown had not entered into "an illegal contract, combination or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing and transporting gas from the Appling Field."

In direct conflict with their finding that Alcoa and Crown had not entered into a combination or conspiracy to restrain drilling for, producing and transporting gas in the Appling Field, the jury found that they had monopolized, attempted to monopolize, or conspired with others to monopolize some appreciable part of "the trade or commerce of drilling for, producing, and transporting gas from the Appling Field" and found various amounts of damages as a result of the Court's instructions.[5]

Respondents moved for judgment on the verdict. Petitioners also so moved with an alternative motion for judgment notwithstanding the verdict. The trial court concluded that the case should not have gone to the jury, denied Respondents' motion and entered judgment for Petitioners. *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* 304 F. Supp. 845, Appendix p. 25.

The Court of Appeals reversed both decisions of the trial court, reinstated the jury verdict as final on liability issues and damages on one part of the case and remanded the case for separate trial on the two parts of the case pertaining to the alleged filing of false nominations to the Railroad Commission by Alcoa and Crown and damages resulting therefrom and pertaining to Respondents' desires to construct a liquids extraction plant and damages arising from the failure to accomplish that desire. *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* Appendix p. 38.

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[5] The entire verdict is set out as footnote 3 to the opinion of the Court of Appeals. Appendix p. 41.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals warrants review on certiorari for several reasons:

I. The reversal of the partial summary judgment based upon the governmental action of the Railroad Commission is in direct conflict with the decisions of this Court in *United States* v. *Rock Royal Co-Op, Inc.*, 307 U.S. 533 (1939); *Parker* v. *Brown*, 317 U.S. 341 (1943); *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1960); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). In addition, such reversal conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, No. 14,605, Slip opinion dated February 12, 1971, 1971 CCH Trade Cases ¶ 73,469, and that of the Court of Appeals for the D. C. Circuit in *Association of Western Railways* v. *Riss & Co.*, 299 F.2d 133 (1962), as well as with the Court of Appeals for the Fifth Circuit's own decision in *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954).

II. In reinstating the jury verdict as final on liability and damages as to part of the case, and remanding the cause for trial on liability issues and additional damage issues as to two other parts of the case, the Court of Appeals holds without evidence and without precedent as a matter of law as to the part of the case where the jury verdict is reinstated that the Appling Field, which is not a market at all, is the appropriate relevant market in which to test the monopolistic power of Petitioners to determine the existence of monopoly, attempted monopoly

or conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

III. In reinstating the jury verdict as final on liability and damage issues on one part of the case and in effect reversing and remanding two other parts of the case for separate trial on liability issues and additional damage issues, the Court of Appeals has so departed from the accepted and usual course of judicial proceedings that supervision and review are required in that Petitioners are effectively denied a jury trial *on the whole case* and in that the jury made the reinstated damage finding of almost $150,000.00 before trebling without having been permitted to hear the excluded final court findings or other evidence on drainage which may well have resulted in a finding of no damages at all to Respondents. Consequently, if parts of the case are to be remanded for trial, then *Petitioners are at least entitled to a jury trial on the entire case.*

ARGUMENT

I.

The Decision Below Permitting Antitrust Recovery For Government Action and Inducing Government Action Conflicts With Decisions of This Court and Those of the Courts of Appeals For the Fourth and District of Columbia Circuits.

In its decisions in *Noerr, Pennington, Parker* v. *Brown,* and *Rock Royal Co-Op,* this Court has clearly defined the application of the antitrust laws to joint action by business entities to bring about governmental action which has or may have an injurious effect on competitors of those seeking the governmental action. The rule is that where the

injury suffered is the result of regulations imposed by governmental regulation or order, such injury is not remediable under the antitrust laws. This is the teaching of *Parker* v. *Brown* and *Rock Royal Co-Op.*

In *Parker* v. *Brown* this court upheld in the face of antitrust attack the California agricultural proration program governing the production and sale of raisins in accordance with a quota system established upon proposals by producers much like gas production nominations to the Texas Railroad Commission stating:

> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

In *United States* v. *Rock Royal Co-Op,* a milk marketing order promulgated by the Secretary of Agriculture under the Marketing Agreement Act of 1937 was attacked as having been obtained by improper influence on the part of certain large milk cooperatives and on the further ground that the order achieved and was intended to achieve a monopoly on behalf of such cooperatives in violation of the Sherman Act. The trial court found that a combination of large cooperatives had used improper influence in obtaining the order and that the combination of cooperatives further carried out a conspiracy to obtain a monopoly through coercive activities consisting of threatened boycotts of milk handlers by producers controlled by the large cooperatives. In holding that the Sherman Act was not violated, the Court said:

> "These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest

> in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order were otherwise valid, the fact their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction". 307 U.S. at 559.

The necessary corollary to the rule is that where alleged injury is suffered as a result of a governmental act or order, those who procured the governmental action or order are not liable for the result. This was made clear by the decision of this Court in *Noerr* and *Pennington,* which followed *Parker* v. *Brown* and *Rock Royal Co-Op.*

Noerr established that even though concerted action of a combination of competitors has the purpose and effect of injuring and restraining other competitors at whom the action is aimed and even though the concerted action involves the use of misrepresentation and deception, a combination seeking in concert to influence governmental action does not constitute a violation of the Sherman Act. In *Noerr,* the defendant railroads and others combined to foster the adoption of laws and administrative practices which would be destructive of the competing trucking interests. The railroad combination resorted to the deception of a third party technique in circulating propoganda that appeared to be the action of independent unselfish groups but which in fact was directed and inspired by the railroad combination. The railroad combination's action included persuading a governor to veto a bill favorable to the trucking industry and influencing the policies of transportation administrative agencies through misrepresentation. The trial court found that the railroads' "publicity campaign, insofar as it was actually directed at law making and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to de-

stroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law". In a unanimous decision reversing the judgment for the plaintiff, this Court held that the combination of railroads to influence governmental action could not constitute a violation of the Sherman Act stating:

> "We accept, as the starting point for our consideration of the case, the same basic consideration of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. (Citing United States v. Rock Royal Co-Op., 307 U.S. 533, 83 L.Ed. 1446, and Parker v. Brown, 317 U.S. 341, 87 L.Ed 315). These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provision of the Constitution.
>
> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associat-

> ing together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly."

In *Pennington* this Court indicated the vitality and breadth of the rule of *Noerr* by holding that a conspiracy between large coal producers and the Mine Workers Union to persuade the Secretary of Labor to take action detrimental to small coal producers was not actionable under the Sherman Act even if a part of a larger over-all conspiracy. In so holding, this Court said:

> "There is another reason for remanding this case for further proceedings in the lower courts. It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations." 381 U.S. at 671.

As significantly pointed out by the trial court in this case, Appendix p. 16, this Court, in *Pennington,* cited with approval the decision of the Court of Appeals for the Fifth Circuit in *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.,* 214 F.2d 413 (5th Cir. 1954), in which the Sherman Act was held not to apply to a situation in which the defendants made a false representation to the State Road Department that there was already a power line serving the area in order to prevent the issuance of a permit to a competitor to build a power line down a county road to serve such area.

The Court of Appeals in the case at bar attempts to circumvent the clear mandate of the decisions of this Court and, indeed its own decision in *Okefenokee,* by ignoring the undisputed fact that the orders of the Railroad Commission limiting production in the Appling Field were valid state action and basing its decision on the assertion that the filing of false nominations alone renders the alleged injury suffered actionable under the Sherman Act.

A disagreement with the scope of the *Noerr-Pennington* principle permeates the Court of Appeals' opinion. It seeks by a grudging and miserly construction to limit the principle to instances where representations to government agencies made to induce particular government action are true and accurate. The Supreme Court recognized no such limitation in *Noerr* when it expressly declared that "falsehood, however reprehensible" did not bring representations to influence governmental action within the antitrust ambit. The Fifth Circuit itself repuditaed any such exception in its own *Okefenokee* decision, cited with approval in *Pennington,* where a false representation that a power line already served the area made to the State Road Department when the line in fact was a "dummy line" did not permit antitrust recovery by a competitor who was denied a permit to build a line on a road to serve the same area because of the false representation. *Okefenokee* is utterly undistinguishable on any rational basis from the claimed false forecasts of market demand held antitrust actionable here. The Fifth Circuit again strains at this distinction in its subsequent decision in No. 30091, *Gas Light Co. of Columbus* v. *Georgia Power Co. and The Southern Co.,* Slip opinion dated March 23, 1971, No. 506 ATTRR-1, in which it seeks to distinguish fixing anticompetitive electric rates by electric utilites with regulatory commission approval, given *Parker* v. *Brown* and *Noerr-Pennington*

immunity, from the present case on the ground that it here "refused to characterize as state action the regulation of production of natural gas by the Texas Railroad Commission, since plaintiffs alleged that defendants filed false information with the Commission." The truth is that the Court of Appeals has attempted to carve out an exception of its own creation to the *Parker* v. *Brown/Noerr-Pennington* rule by making its applicability hinge on the truth or falsity, accuracy or inaccuracy, of representations made to government agencies to induce government action. It further, by an exception of its own origination, would carve out "administrative adjudicative" government actions and confine the rule to legislative and policy-making actions. This attempted erosion of the doctrine by whittling away at it seemingly invites the Supreme Court to retreat from the rule as it has heretofore asserted it. Even if the nominations filed with the Railroad Commission by Petitioners were false, the rule of *Rock Royal Co-Op* and its progeny through *Pennington* requires a holding that injury suffered as a result of the orders of the Commission based upon such nominations is not within the Sherman Act.

The Court of Appeals asserts that the filing of false nominations by Petitioners placed them in the position of the "real decision makers". In so asserting, the Court of Appeals ignores the undisputed facts as set forth in the opinion of the trial court, Appendix pp. 7-8, and the undisputed facts set forth in the three previously discussed opinions of the Supreme Court of the State of Texas, that producers' forecasts or nominations were, in fact, ignored by the Commission in the setting of allowables in the Appling Field. In so asserting, the Court of Appeals ignored uncontroverted evidence which was before the trial court on motion for summary judgment that the Railroad Commission was fully cognizant of the unrealistically high

nominations filed by Respondents and other town lot operators, and had monthly reports of actual production from all producers in the Field which, instead of nominations, were used by the Commission in establishing allowables. It had full knowledge of all that transpired in the Appling Field demonstrated by the previously described litigation to which it was a party involving Commission orders in the Field as shown by the three state court opinions contained in the Appendix.

This knowledge on the part of the Commission brings the decision of the Court of Appeals into direct conflict with that of the Court of Appeals for the Fourth Circuit in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, No. 14,605, slip opinion dated February 12, 1971. In that case the Court of Appeals holds that where conduct of an antitrust defendant is regulated by a state agency and where the plaintiff's alleged injury is the result of regulation by the state agency or its knowing inaction against the complained of conduct, the claimed damages are the result of state action and not recoverable under the Sherman Act. The court points out that where the conduct of the defendant complained of is subject to regulation by a state agency, the plaintiff should first give that agency the opportunity to rectify the situation by regulation much as in the fashion where primary jurisdiction of a regulatory agency requires reference of a controversy to that agency prior to adjudication in a court. *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486 (5 Cir., 1966).

The action of the Railroad Commission in setting allowables in the Appling Field is state action regardless of its basis. In conflict with the opinion of the Fifth Circuit below, however, the Fourth Circuit makes it clear that state action would be present even when the regulatory agency did not act. It must be concluded, however, that by basing

allowables upon production figures rather than nominations, the Railroad Commission did knowingly act and the result of that action cannot be the subject of antitrust recovery particularly in view of the fact that Respondents never sought any other action by the Railroad Commission. Under the pervasive regulatory scheme established by the provisions of Art. 6008 of the Texas Statutes found in the Appendix Respondents had a complete remedy on every complaint concerning false nominations by Petitioners before a regulatory agency broadly empowered to deal with the matter. They never availed themselves of this recourse for the obvious reason that the Commission was already keenly aware of Respondents' ravaging of Petitioners' gas reserves through aggravated drainage and would not likely respond to any effort by Respondents to compound the offense by procuring still increased drainage through increased gas production allowables.

The conflict between the decision below and that of the Court of Appeals for the District of Columbia in *Riss* is clear and need not be expanded upon in that in *Riss*, the Court of Appeals followed and relied upon the decision of this Court in *Noerr* in a case almost identical on the facts to that presented in *Noerr*.

To resolve the conflict between the decisions of the Courts of Appeals and the conflicts of the decision below with the ruling decisions of this Court, the writ should issue and the decision of the trial court should be affirmed.

II.

Piecemeal Retrial of Damage Issues Based Upon A Holding As A Matter Of Law That The Appling Field Is The Relevant Market Requires Supervision and Review.

The decision of the Court of Appeals that this single, small gas field in which no gas was marketed is the appropriate relevant market *as a matter of law* for a Section 2 Sherman Act monopoly is an alarming precedent disastrous to the essential economic realities of the oil and gas industry. Such holding is not only totally without supporting precedent but is also in cavalier disregard of the basic economic and legal structure of the industry, which is the blocking together of a sizeable number of contiguous leases covering substantial acreage by a single company or joint venture as required for the economic and physical feasibility of the necessary geological and geophysical studies, financing, exploratory drilling, development drilling, production, transportation, and marketing indispensable to the discovery and development of a natural gas field all in a highly regulated program in which every well must be located, spaced and drilled in accordance with a Railroad Commission permit, completed and operated under regulations adopted by the regulatory agency and under field rules issued by it for the particular gas field, and with all production being in allowable amounts allocated to each well by the state authority under a system of full reporting to and inspection and supervision by the governing body. Art. 6008, Texas Statutes (Appendix p. 147). The consequence is that most gas fields are owned in whole or in large part by a single company or a small group of joint operators as the inevitable result of economic and physical necessity and state regulation. This

decision renders literally hundreds of them likely Section 2 monopolies.

As is clear from the opinions below, the trial court's instructions and form of verdict assumed that the Appling Field was the appropriate relevant market. On post verdict motions, the trial court held that this was erroneous. The Court of Appeals reversed the trial court and held as a matter of law that the Appling Field was the appropriate relevant market. It is respectfully submitted that the post-verdict ruling of the trial court was correct because the undisputed evidence and all of the evidence on the subject was to the effect that the Appling Field is not a market at all, either relevant or irrelevant, because gas produced from the Field was not sold in the Field. The gas from the Field was sold in the Houston, Gulf Coast area in competition with vast quantities of gas from other areas brought to that general area from elsewhere by numerous pipelines which provide easy access for gas from point of production to the market just as most gas fields find their market in a distribution area or at an interstate gas pipeline removed from the gas field.

Despite the not only apparent but real and hopeless conflict in the answers of the jury to Questions One and Two, which renders the verdict incapable of supporting any judgment, the Court of Appeals has reinstated the verdict of damages based upon the finding of the jury that Alcoa and Crown monopolized or attempted to monopolize, or conspired with others to monopolize an "appreciable part of the trade and commerce of drilling for, producing and transporting gas from the Appling Field." As a base for this holding, the Court of Appeals equates production of gas in this Field with "any part of the trade or commerce among the several states," 15 U.S.C. § 2, and finds as a matter of law that the Appling Field as such

is therefor the appropriate relevant market and states that the jury was entitled to believe that the Defendants had monopolized that "market." Thus the court below evades any concept of a market which heretofore has been the essential matrix in which a Section 2 violation must be found.

The controlling decisions of this Court have consistently held that monopolization under Section 2 of the Sherman Act requires proof that establishes the present existence of such market domination that the monopolist has "the power to control prices or exclude competition". *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1965). In *Grinnell* this Court elaborated:

> "The offense of monopoly under Section 2 . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident.
>
> • • •
>
> "In United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 396, 391, we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market."

There has never been any claim that Alcoa and Crown possessed or exercised any power over prices of gas from the Appling Field. The uncontroverted evidence in this case shows a total lack of power to exclude competition because it established that Respondents produced, transported and marketed all of the gas which was legally permissible and physically possible from their wells in the Appling Field.

Further, the Appling Field under the undisputed evidence totally fails to meet this Court's further test of the appropriate relevant market as "the area of effective competition" when under the undisputed evidence *there was no competition at all* in the marketing of gas there because none was sold there. *Standard Oil Co. of California and Standard Stations* v. *United States*, 337 U.S. 293, 299 (1949).

The sum and substance of the decision below is that Petitioners have been convicted of monopolization, or an attempt or conspiracy to monopolize the Appling Field, on a reinstated jury finding by a jury that was instructed that the Appling Field was the subject of the violation. The relevant geographic market in this case has been established merely by the ipse dixit of Respondents without proof of restriction upon competition but with the approval of the Court of Appeals.

The absence of proof by Respondents of any monopolistic power in Petitioners in any market and the fact that under the undisputed evidence the Appling Field cannot be the appropriate relevant market entitle Petitioners to judgment. Petitioners, even if it be deemed that there is *some* evidence that the Appling Field is the relevant market, are at the very least entitled to a jury trial on the issue of what constitutes the relevant market and the propriety of their conduct therein. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456, 459, *cert. denied on monopolization issues*, 387 U.S. 932 (1967).

III.

Fragmenting the Case into Three Parts and Remanding Two Parts for Separate Trial Denies Petitioners a Jury Trial on the Whole Case and Constitutes Such an Abuse of Established Judicial Practice and Procedure as to Require Supervision and Review.

It is developed in I that the *one part of the case* involving injury from the governmental action of the Texas Railroad Commission allegedly induced by Petitioners is remanded for separate trial on issues of liability and damages. It is developed in II that, despite the fact that the case was submitted to the jury as a *whole* case for which the jury found *total* damages, the Court of Appeals seeks to reinstate the jury verdict as final only as to a *second part* of the case relating to monopoly, attempted monopoly or conspiracy to monopolize the Appling gas field as solely related to the alleged unnecessary construction by Respondents of a pipeline with the total damages found by the jury being attributed by the Court of Appeals to this part of the case only. The opinion below evidently seeks to finalize and segregate the damage award as to this part of the case only, disregarding the fact that the partial summary judgment on the first part of the case resulted in the exclusion from the jury of the evidence and the final state court findings of vast drainage by Respondents of Petitioners' gas, which goes to wipe out any damages in the *whole case*—including the part as to which the court seeks to allocate and affirm the damages found by the jury.

As a final part of the novel fragmentation process, the Court of Appeals further remands a *third part of the case* involving the alleged frustration by Petitioners of Re-

spondents' desire to enter a new business by constructing a liquids extraction plant in the Appling Field for separate trial on liability and damage issues. If the extraction plant is a separate cause of action, it is long since barred by the four-year limitation statute because over four years elapsed between the occurrence and Respondents' first mention of it in their Second Amended Petition. 15 U.S.C.A. 15b. If it is merely an evidentiary part of the original cause of action, it cannot be separately tried and separate damages accorded to it as a separate case. To do this would not only be repugnant to any known federal judicial procedure but taken with I and II would also effectively deny Petitioners a jury trial on the *whole case.*

The one case cannot be splintered into three inter-related parts and tried as if they were three separate and distinct cases. The part about the pipeline cannot be severed from the part about the extraction plant and separate damages be awarded for each when there is only one cause of action, one claimed Section 2 violation, and one injury —though perhaps separate elements of single damages. Neither can the part about nominations for gas production allowables to the Texas Railroad Commission which is remanded for trial be separately tried from the other two parts, because the excluded evidence on final state court findings of tremendous drainage of Petitioners' gas by Respondents relates to all three—to *total single damages for the whole case.* See *Magenau* v. *Aetna Freight Lines, Inc.,* 360 U.S. 273, 279 (1959), where this Court ordered "a new trial on the whole case" because the "disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

Not only does the Court of Appeals deny Petitioners a proper jury trial and reinstate the damage verdict based upon the erroneous holding that the Appling Field is a

relevant market, but it sends the case back for trial presumably to determine both liability issues and additional damages based upon the extraction plant. The record in the trial court will demonstrate that not only the damages found by the jury but those ordered to trial on the extraction plant were based primarily upon a claimed agreement between Respondents and Lumar Pipeline Company for joint use of facilities and the possible construction of a liquids extraction plant. The undisputed evidence was that there was no such agreement and that the document introduced by Respondents as evidence of the claimed agreement was a "crude, amateurish, traced forgery" of the signature of the President of Lumar and the jury so found by its answer to Question No. Four. This part of the case is remanded for trial despite this fictional basis for Respondents' claims, and despite the fact that the transactions upon which the claim is based were not complained of until after limitations had expired.

It is arguable that the court below remanded this third part of the case for a trial to determine only the amount of additional damages arising out of the failure of Respondents to achieve their desire of constructing the liquids extraction plant pinning such trial to the reinstated answer of the jury to Question No. Two and the court's own holding as a matter of law that the Appling Field was the appropriate relevant market which had been monopolized by Petitioners. On this construction it is inconceivable that Respondents can be awarded two separate and cumulative damage awards in two separate trials on the same cause of action based on the same Section 2 violation in the same relevant market on the basis of two separate evidentiary damage elements for the same injury. It seems elementary that if the reinstated damage award is affirmed, all damages are thereby determined. If the extraction plant part is remanded, all damages must be remanded.

CONCLUSION

This seems to be a clear case for certiorari for three strong, solid reasons:

(1) The remand for trial on the claimed insufficiency of Respondents' gas production allowables granted by the state regulatory agency and allegdly induced by Petitioners is a patent evasion of *Noerr*, a deviation from *Pennington* and a repudiation of *Okefenokee*.

(2) The reinstatement of the jury verdict predicated on the Court of Appeals finding as a matter of law that the single gas field constituted the relevant market for Section 2 monopoly purposes although no gas was sold in the field is not only completely unprecedented but is a drastic and dangerous departure from fundamental judicial concepts on the determination of relevant market.

(3) The fragmentation of a single cause of action predicated on a single alleged Section 2 violation as to a single gas field into *three parts*, as to *one* of which the Court of Appeals assigns the reinstated jury findings including damages, and the other two of which are remanded for severed and separate trial, not only effectively denies Petitioners a jury trial on *single* damages as to the *whole* of *one* case and assesses partial damages to one part of the case on the basis of a finding by a jury that never heard the drainage evidence that goes to damages on the whole case or any phase of the case, but constitutes a radical and revolutionary disruption of established judicial practices and procedures.

In the course of arriving at these three astounding consequences the Court of Appeals has effectively scorned the successive findings of the Supreme Court of Texas that these Respondents have drained and confiscated enormous

stores of these Petitioners' gas in this same gas field during the course of and as a part of this same controversy. The result rewards the ravishing of the reserves of gas owned by Petitioners by according Respondents the accolade of a treble damage bonanza as premium for the plunder. This shocking subversion of simple justice at the least constitutes an arrant abuse of the treble damage remedy and of the judicial process which affords it.

The petition should be granted, the judgment of the Court of Appeals reversed and the judgment of the trial court affirmed.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this ..... day of May, 1971, thus serving all parties required to be served.

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM—1970

NO ~~1713~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petiltioners,
v.
WOODS EXPLORATION & PRODUCING COMPANY,
ET AL, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF WOODS EXPLORATION & PRODUCING COMPANY, ET AL, IN OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

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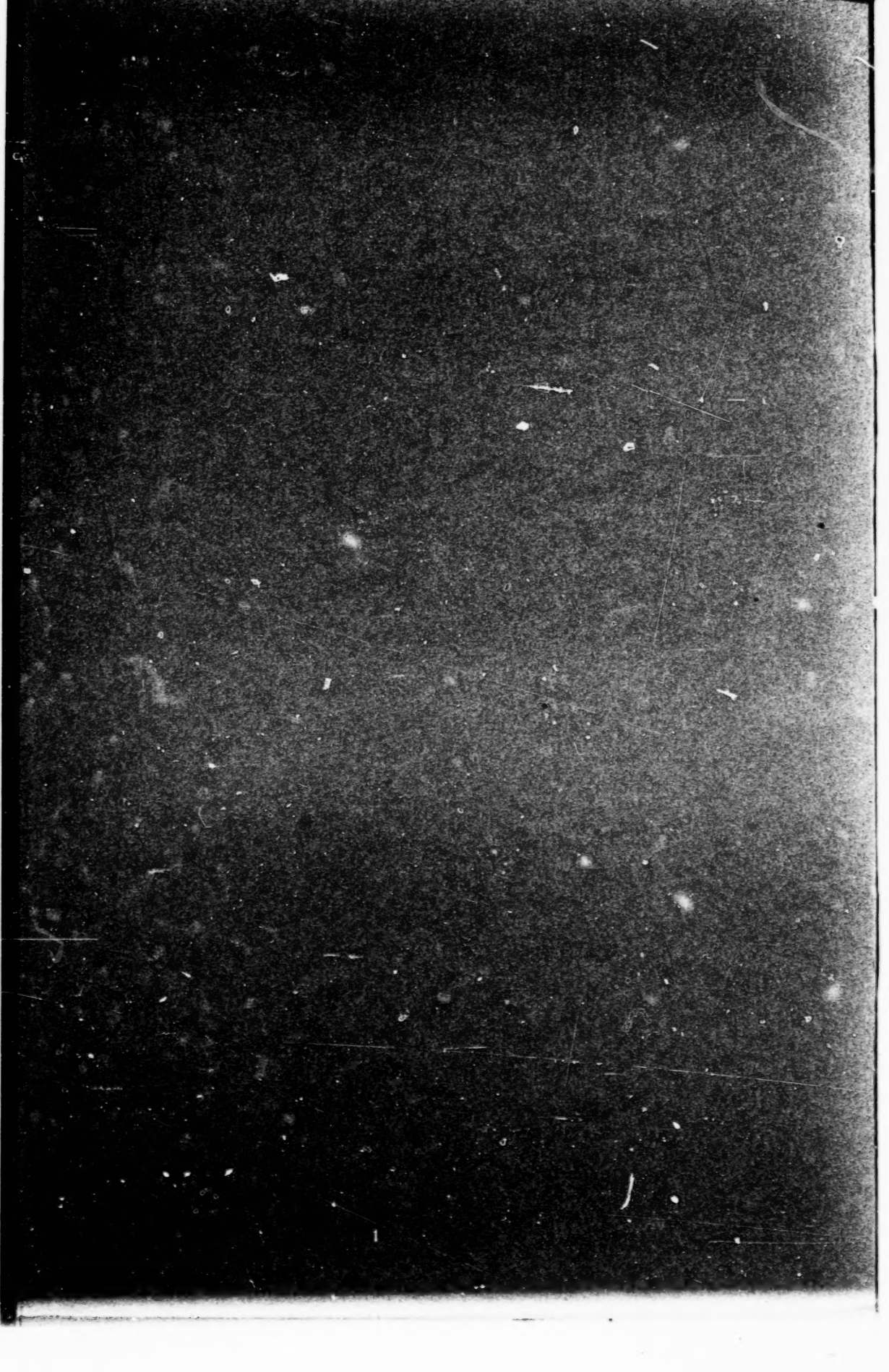

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IN THE

Supreme Court of the United States

OCTOBER TERM—1970

NO 1712

ALUMINUM COMPANY OF AMERICA, ET AL,
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v.

WOODS EXPLORATION & PRODUCING COMPANY, ET AL, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF WOODS EXPLORATION & PRODUCING COMPANY, ET AL, IN OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court (Petitioners' Appendix pages 1 and 25) are reported in 284 F.Supp. 582 and 304 F.Supp. 845. The opinion of the Court of Appeals (Petitioners' Appendix 38) is reported in 438 F.2d 1286 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered on the 5th day of January, 1971. Motion for rehearing was overruled on the 17th day of March, 1971. Petition for certorari was filed on the 15th day of May, 1971. The petition was received by counsel for Woods Exploration & Producing Company, Inc., et al, on the 17th day of May, 1971. The jurisdiction of this court is invoked under Title 28 U.S.C. 1254(1).

STATUTES INVOLVED

Title 15, §§1 & 2, commonly referred to as the Sherman Antitrust Law; and § 4, commonly referred to as the Clayton Act and Articles 6049a, 6049e, 6050 of the Revised Statutes, and RR Comm. Rule 30 are set forth in the Appendices of this brief, pages 19-24.

QUESTIONS PRESENTED

1. Whether the filing of false and perjured nomination forecasts with the Texas Railroad Commission pursuant to a conspiracy to monopolize the extraction, production and transportation of gas in the Appling Field for the purpose of reducing Respondents' production allowable are subject to antitrust restrictions.

2. Whether the production, transportation and sale of natural gas constitutes a part of trade or commerce for purposes of the Sherman Act.

3. Whether the Appling Field, covering over 4,000 acres and extending in two counties in Texas, constitutes the relevant geographic market or alternatively,

Whether "the relevant market" consists of the arena within which the strength of competitive forces is meas-

ured, or whether under the facts the relevant area of competition constitutes the part of trade and commerce with regard to which the power to exclude competition must be measured.

STATEMENT

Respondents, Woods Exploration & Producing Company, Stanley Woods, and Southeastern Pipeline Company, instituted this action in the United States District Court for the Southern District of Texas, Houston Division, alleging that Defendants in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. and Section 4 of the Clayton Act have entered into a combination and/or conspiracy in restraint of trade or commerce and have monopolized or attempted to monopolize, etc. The acts charged in furtherance of such conspiracy consisted of:

(1) The filing of false nomination forecasts by defendants with the Texas Railroad Commission so as to reduce Plaintiffs' production allowables, and

(2) The thwarting of Plaintiffs' gas production by Defendants' refusal to deal; Defendants' harassment and interference with Plaintiffs' operations in the drilling and production of gas;

(3) The thwarting of the agreement with:

(a) Lumar Gas Corporation to construct a liquid extraction plant;

(b) Graver Oil & Gas Equipment Company and

(c) Marler Construction Company for the erection of a plant with Southeastern Pipeline Company to Southeastern's damage.

The trial court sustained a partial motion for summary judgment eliminating Plaintiffs' cause of action alleging it sustained damages by reason of Petitioners having filed false and perjured nominations before the Railroad Commission, 284 F.Supp. 582. At the end of the trial on the rest of the remaining issues, the court instructed the jury not to consider any damages which Plaintiffs might have suffered from the loss of opportunity to participate in the construction of a liquid extraction plant and the loss of profits from an extraction plant which was contracted to be built for Respondents by Graver or Marler Construction Company, but submitted to the jury other items of damage. The jury returned a verdict for Plaintiffs (R. 3341). On post verdict motion for judgment filed both by Petitioners and Respondents, the court granted Petitioners' motion for judgment notwithstanding veredicto denying relief, 304 F.Supp. 845. The Court of Appeals reversed, 438 F.2d 1286, directing:

1. The District Court to enter judgment for Respondents in the amount found by the jury, reversed the grant of summary judgment, and

2. Remanded for an evidentiary determination as to whether or not Defendants in fact, filed false nominations, and if so, what damages respondents sustained therefrom; and

3. Further ordered the District Court to hold a trial for the purpose of determining if Respondents' allegation with respect to the proposed extraction plant are true, and if so, the extent of damages flowing therefrom.

On hotly contested issues of fact, the jury found Alcoa and Crown monopolized, attempted to monopolize and conspired with F. E. Appling, Carl Seigesmund or Houston Pipeline Company to monopolize an *appreciable part*

of the trade and commerce of drilling, producing and transporting gas from the Appling Field (R. 3327). Predicated on an affirmative answer on such question, the jury found that Alcoa and Crown refused to deal with Stanley Woods, individually, and with Woods Exploration & Producing Company. That as a result of such combination and conspiracy, monopoly or attempt to monopolize, etc., Petitioners acting with F. E. Appling, prevented Fred Wolcott from signing Plaintiffs' exhibit No. 85A (contract providing for the building of a joint pipeline and found damages in the sum of $142,759.00, and that Woods Exploration & Producing Company was damaged in the sum of $500.00.

Petitioners, in their statement of the case (pages 6-13 of their petition for cesrtiorari), overstate their case. By way of example, Petitioners contend that Lavaca Pipeline Company, a wholly owned subsidiary of Petitioner Aluminum Corporation of America, did not purchase nor transport gas in the Appling Field for others than Alcoa, Crown and Pocantico. The uncontraverted evidence is that it sold its gas to Houston Natural Gas, to Monsanto, and also purchased gas from and/or transported gas for other producers in the Appling Field such as Sun Oil (Tr. 2742) from a subsidiary of Phillips Petroleum Company and from Layton-Brown (Tr. 2752-2756). Moreover, under the express provision of Article 6049(a) §8aa, Revised Civil Statutes of Texas, in force at all times material to this case under the undisputed facts of the record, Petitioners' subsidiary Lavaca Pipeline Company was a common purchaser. Article 6049(a) §8aa Vernon Annotated Texas Statutes, it was also a common carrier under Article 6050, Vernon Annotated Texas Statutes. (Appendices A&B, pp 19-20.) Statutes

because its pipeline crossed under and over number of county lines (Tr. 2741-2742), which makes it a gas utility or public utility. Therefore, Petitioners' contention that it had no duty either to purchase or transport Appellants' gas is not supported by either the facts or the applicable statutory provisions. However, the question whether Petitioners' wholly owned subsidiary Lavaca Pipeline Company was or was not either a common carrier or a common purchaser or both, or whether it purchased gas from other producers of gas in the Appling Field is wholly immaterial if in fact, as the jury found, that as a part of their unlawful conspiracy to monopolize and to restrain the production of gas within the Appling Field, it refused to deal with Respondents and prevented Lumar Gas Pipeline Company to enter into an agreement to build a joint pipeline to Respondents' damage.

When Respondent Woods became interested in the Appling Field, he was aware that the Railroad Commission had set the 1/3rd-2/3rd rule in the Appling Field and on that basis, Woods and Woods Exploration & Producing Company and its investors invested considerable sums of money to drill these gas wells, projecting the probable return under the applicable rules existing in that field. In *Railroad Commission v. Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964), the case cited by Petitioners, the Supreme Court of Texas took cognizance of the fact that the Aluminum Company of America sought and aided in the establishing of this very rule and after it was set in operation it acquiesced in it for a long period of time without complaint. The Texas Supreme Court held that after such length of time, it would be inequitable to require the Commission to overturn the pro-rata formula that has been in effect in this and

other fields for years where operators have drilled and completed wells at great expense in reliance of such formulas and where conditions had become stabilized. *Railroad Commission of Texas v. Aluminum Corporation of America,* supra.

Petitioners ignore the real question which is how much more gas Respondents would have produced under the 1/3rd-2/3rds rule had Petitioners not filed perjured and false nominations. Rule 30 of Texas Railroad Commission (See Appendix C, p. 21). Therefore, if such false and perjured nominations, in fact, caused lower allowables, causing Respondents to produce less gas than they would have been entitled to produce, it would then be entitled to whatever damages the proof may show they suffered as a result thereof.

For a correct factual background, Respondents respectfully refer the Court to the opinion of the Court of Appeals, 438 F.2d, pages 1300-1302.

I.

BY FILING OF FALSE AND UNJUSTIFIABLY LOW FORECASTS IN ORDER TO REDUCE RESPONDENTS' PRODUCTION ALLOWABLES, PETITIONERS SUBVERTED THE RAILROAD COMMISSION'S SCHEME OF SETTING ALLOWABLES ON RESPONDENTS' WELLS.

ARGUMENT AND AUTHORITIES

At this posture, Respondents' allegations that Petitioners have filed false and perjured nominations in order to subvert the Railroad Commission's scheme in setting allowables by filing unjustifiably low forecasts in order to reduce Petitioners' production allowable must be taken as true.

Petitioners seek to defend their action by stating that this was a state action and therefore, not subject to the antitrust laws. In doing so, Petitioners rely on *Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 464; *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315; *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., et al,* 214 F.2d 413 (5th Cir. 1954); and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585 (1965), 14 L.Ed.2d 626. However, because of the facts as pleaded in this case, the same argument was rejected by the Texas Court in *Woods Exploration & Producing Co. v. Aluminum Corp. of America,* 382 S.W.2d 343, writ denied, Supreme Court of Texas, n.r.e., adopting Judge Ingraham's opinion in which he clearly stated that (36 F.R.D. 107) Respondents did not attack the validity of any order of the Texas Railroad Commision but are attacking the conspiracy under the antitrust laws, one of its manifestations being the filing of false nominations.

As the opinion of the Court of Appeals reveals, Respondents here have also filed suit in the State Court, claiming violation of the state antitrust laws. Petitioners here, defendants in the state court case, filed their motion for summary judgment contending as they do here, that this was state action and could therefore not be the basis for an antitrust suit. The Court of Appeals of Texas reversed, 382 S.W.2d 343, 1964. The Texas court in reversing the summary judgment rejecting Petitioners' contentions, stated as follows, stating:

> "Appellees contend by their counterpoint III that nominations or other representations made by them to the Railroad Commission of Texas, whether individually or in concert, for the purpose of influenc-

> ing the governmental action of such commission in fixing gas production allowables, as a matter of law, cannot constitute a violation of the Texas antitrust statutes or form the basis or subject matter of an antitrust damage action."

The case at bar is much stronger and differs substantially from *Trucking Unlimited v. California Motor Transport Company*, 432 Fed.2d 755. In *Trucking*, the district court specifically noted that there were no allegations that defendant's presentations to the governmental agencies and the courts were in themselves false, misleading or lacking in evidentiary or legal support. In the case at bar, however, the complaint charges that petitioners filed false and perjured nominations as part of the jury-found conspiracy.

Moreover, the Texas Statutes establishing the Railroad Commission and its functions specifically provide that the antitrust and/or monopoly statutes of Texas shall not be affected thereby[1] (See Appendix D, p. 22). In any event, this court has held that fraudulent statements to a governmental agency coupled with violations of Section 2 does not exempt one from the application of the antitrust laws. *Walker Process Equipment v. Food Machine & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

II.

THE RELEVANT MARKET

Petitioners completely ignore this court's admonition that "immunity from antitrust laws is not lightly implied."

---

1. Section 19 of Article 6049e, Vernon's Annotated Texas Statutes provide as follows: "Sec. 19—it is especially provided that nothing herein shall in any manner affect, alter, diminish, change, or modify the antitrust and/or monopoly statute of this state. And that no provision of this act shall in any manner directly or indirectly authorize the violation of such antitrust or monopoly statutes, etc."

United States v. First City National Bank of Houston, 386 U.S. 361, 87 S.Ct. 1088, 1099, 18 L.Ed.2d 151, quoting from *California v. Federal Power Commission,* 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54. In paying no heed to this court's decisions in *United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966); *United States v. Continental Can Co.,* 378 U.S. 441, 458, 84 S.Ct. 1738, 12 L.Ed.2d 953, 964; and *Klor's, Inc. v. Broadway Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), they argue that the Appling Field cannot constitute a relevant market first because of the limited geographic locality and secondly, because it is a source of supply rather than a market.

As so aptly stated by Judge Goldberg, Petitioners' argument fails to recognize that "relevant market" is simply a shorthand phrase used to describe the "arena in which the strength of competitive forces is measured." In *Pabst Brewing* case, supra, this court held (pg. 1668):

> "Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States."

Respondents here never contended that Petitioners possess or attempted to possess nationwide monopoly power over the marketing and/or transportation of natural gas. Instead, Respondents contended that Petitioners possessed monopoly power over the extraction and transportation

of gas from the Appling Field. With regard to extraction of gas—which is at the heart of Respondents' complaint, the Appling Field is the relevant area of competition. It is "part of trade and commerce" with regard to which must be measured the power to exclude competitors. In *Denver Petroleum Company v. Shell Oil Company,* 306 F.Supp. 289 (Dist. Court, Colo. 1969), the court in discussing the relevant market held that one county in New Mexico, the Basin-Rio Arriba oil production area, was a relevant market.

Petitioners and their co-conspirators were located and operated in the Appling Field. The most likely source of supply for Southeastern Pipeline Company was the Appling Field. The Appling Field is a separately defined geographic reservoir and so made by statute. The statute makes the market demand for the Appling Field a recognized sub-market. The sole and only possible area of competition between Petitioners and Respondents is the production and transportation of gas from the Appling Field. The area which the Petitioners sought to appropriate for themselves was the Appling Field. Under the facts in this case, the relevant market is the Appling Field. This court in *United States v. Phillipsburg National Bank & Trust Co.,* 399 U.S. 350, 90 S.Ct. 2035 (1970) has held a relevant market to be a much smaller area.

It is respectfully submitted that under *North Texas Producers' Association v. Mezger Dairies, Inc.,* 348 F.2d 189 (C.A. 1965); *Klor's,* supra; *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 68 S.Ct. 996, and the cases hereinabove cited there can be no question but that under the facts in this case, the relevant market is the Appling Field.

The Petitioners' complaint seems to be that the jury did not determine that the Defendants controlled prices *or* excluded competition in commerce which is significant with *relevant* impact on interstate trade. But the fact is that the District Court fully instructed the jury on this and by their answer to question 2, passed on these very facts. (See Appendix E, p. 23).

Thus, it is readily seen that the jury in answering "yes" to question 2 found all of the underlying facts of "relevant market."

While Petitioners do not directly challenge that the gas from the Appling Field did not flow in interstate commerce, and hence, was not subject to the antitrust laws, they do so in an oblique fashion. However, the decisions of this court refute such contention even if obliquely made. Entirely aside from the admitted facts that all Petitioners are engaged in interstate commerce, it is now beyond dispute that the production, transportation, and sale of natural gas constitutes a "part of" "trade or commerce" for purposes of the Sherman Act, *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 657, 84 S.Ct. 1044 (1964), 12 L.Ed.2d 12; *United States v. Grinnell Corp., et al*, 384 U.S. 563, 573, 86 S.Ct. 1698, 16 L.Ed. 778 (1966). Not only did Crown and Alcoa[2] do business in states other than in the State of Texas, and were engaged in the production, transportation and sale of gas from the Appling Field, but it is without dispute that their gas comingled with gas being transported through pipelines carrying gas from one state to another and therefore, entered into the flow of interstate commerce. *People of State of California v. Lo-Vaca Gathering Co.*, 379 U.S.

2. In fact, Alcoa is engaged in world-wide operations.

366, 85 S.Ct 486, 13 L.Ed.2d 537 (1965); *Mandeville Island Farms v. American Crystal Sugar Co.*, supra; *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), cert. den'd 390 U.S. 904, 88 S.Ct. 816, 9th L.Ed. 870; *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir. 1964); *Hardrives Company, Inc. v. East Coast Asphalt Corp.* (5th Cir. 1964), 329 F.2d 868, holds that even purely local activities may be still violative of the Sherman Act if it substantially affects interstate commerce market either directly or through its interplay with other business activities.

III.

THE APPELLATE COURT PROPERLY REVERSED THE SUMMARY JUDGMENT AND REMANDED FOR AN EVIDENTIARY DETERMINATION

(1) WHETHER OR NOT PETITIONERS FILED FALSE NOMINATIONS AND IF SO, WHAT DAMAGES PLAINTIFFS SUSTAINED THEREFROM, AND

(2) REMANDED FOR TRIAL FOR THE PURPOSE OF DETERMINING IF RESPONDENTS' ALLEGATION WITH RESPECT TO THE PROPOSED EXTRACTION PLANT ARE TRUE AND, IF SO, THE EXTENT OF DAMAGES FLOWING THEREFROM.

Petitioners' able counsel misconceives the holding of the Court of Appeals and without authorities to support its contention charges that the Appellate Court in re-

manding for trial 1 and 2 above, abused the established judicial practice and procedure.

The cases are uniform and it is a well established principle of federal law that where the requirement of a jury trial has been satisfied by a verdict according to law upon any issue of fact, here a violation of Section 2 of the Sherman Act, there is no requirement compelling a new trial on such resolved issues even though another trial on separable issues must be tried again. In the case at bar the separate and distinct issues are those excluded by the trial court (1) if Petitioners filed perjured nominations, and (2) were Respondents prevented by Petititioners to erect an extraction plant. These issues are separate and distinct and their determination not entwined with the jury's answer to question 2. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513. Certainly all factual questions with respect to liability have been fully developed, considered and passed on by the jury. *American Locomotive v. Harris*, 239 F. 234 at page 246.

The decision of the Court of Appeals in the case at bar is consistent with justice and respected precedent. In *Noel v. United Aircraft Corp.*, 359 F.2d 671 (5th, 1966), the court remanded the case to the trial court for a reconsideration of the amount of damages which it found to be inadequate. See also: *Turrentine v. American Home Assurance Co.*, 279 F.2d 811 (C.A. 5th, 1960); *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, at p. 1041.

What Petitioners refused to accept is that the jury on contested issues found them in violation of Section 2 of the Sherman Act and this contested fact issue having been decided in favor of Respondents, they were entitled to all

of the damages suffered by them as a proximate cause of Petitioners' jury found illegal acts. The jury in response to question number 5 predicated as it was on an affirmative answer to question number 1 or 2 found that Petitioners, acting together with F. E. Appling, prevented Fred Wolcott from signing Respondents' Exhibit Number 85A. The testimony of the witnesses, Robert L. Topper, Maurice S. Williams, James S. Simmons and Curt Gallagher proved that the parties have agreed to the building of an extraction plant with Lumar Pipeline Company and agreed on all the terms and conditions under which it was to be erected and how the profits were to be distributed; that Petitioners thwarted this agreement, to the damage of Southeastern, that Southeastern reached similar agreements with Graver Oil & Gas Equipment Company, Marler Construction Company and Sinclair Oil & Gas Company for the erection of a plant on the Southeastern pipeline, and that Petitioners frustrated these agreements to the damage of Southeastern. The trial court in its charge to the jury excluded any consideration of damages flowing from the failure to construct an extraction plant (R. 3321). The evidence which Respondents introduced would have supported a finding that Southeastern had both the intention and the preparedness to construct an extraction plant and that if the jury so found, Southeastern would be entitled to damages. The Appellate Court properly remanded that portion of the case for trial so Respondents may prove, if they can, before a jury what damages they sustained.

Petitioners protest (page 3 of their Application) that damages for the loss of the extraction plant cannot be recovered because Wolcott did not sign the instrument (Exhibit 85A) is completely void of any merit. First,

because there is not a scintilla of evidence that Respondents had anything to do with such signature and, second, the jury's answer to question 5 establishes by substantial evidence that Petitioners and their co-conspirator F. E. Appling prevented Fred Wolcott from signing Respondents' Exhibit 85A.

The *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 279 (1959) is simply not in point. In *Magenau*, the court reversed the case on the liability issue. The question there being whether a stranger, driving along with the truck driver to help him because he had trouble with the truck a number of times, became the servant of the truck driver's employer rather than the owners of the truck and therefore relegated to the benefits of the workmen's compensation laws of the State of Pennsylvania. But not so here. In the case at bar, the issue of liability was passed on by a jury on amply supported evidence. In any event, Petitioners' attack is centered on what Petitioners claim to be an absence of the relevant market, and a lack of power to monopolize, but such issue was resolved against Petitioners.

In these days when courts are clogged with litigation it would be contrary to the bars' and judicial efforts to expedite litigation, to remand for a trial on issues already fully developed and passed upon by a jury on a case that has been pending almost nine years and a trial which took over six weeks.

CONCLUSION

It is clear that the Court of Appeals acted well within the intent of the Congressional enactment of the Antitrust Laws of the United States, and its decision entirely ap-

propriate under the facts. The questions raised by Petitioners do not warrant a review by this court. Indeed, the opinion of the Court of Appeals is grounded on sound legal principles and recognized authority as expressed by the decisions of this court. It is therefore respectfully prayed that Petitioners' application for a writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served, on the 11th day of June, 1971, on Messrs. Vinson, Elkins, Searls & Smith, First City National Bank Bldg., Houston, Texas 77002, attorneys for Petitioners, by piacing the same in a properly addressed envelope, postage prepaid, and depositing the same in the United States mail.

Arthur J. Mandell

ARTHUR J. MANDELL

APPENDIX A

Art. 6049a.

Additional persons as common purchasers

Sec. 8aa. In addition to persons enumerated in Section 8, hereof, any and all other persons, association of persons, or corporations, operating any pipe line, which may now, or hereafter, purchase crude oil, petroleum, or natural gas in this State, whether they be common carriers or affiliated with common carriers or not, shall be a common purchaser of such crude oil, petroleum or natural gas, and shall purchase crude oil, petroleum or natural gas, offered it for purchase without discrimination in favor of one producer or person as against another as provided in Section 8 hereof.

Anti-trust laws unaffected

Sec. 8bb. It is expressly provided that no provision of this Act shall be construed as in any wise modifying, limiting, changing, repealing, or affecting any part of the present laws of this State defining and regulating trusts, monopolies, and conspiracies in restraint of trade; and that no provision of this Act shall be construed as authorizing any agreement and/or combination of capital, skill, or acts and/or any combination or consolidation now prohibited by the Anti-trust Laws of this State and/or the laws of this State prohibiting trusts, monopolies, and/or conspiracies in restraint of trade; and that no provision of this Act is intended or shall be construed as authorizing any agreement, act, combination, consolidation, or otherwise, which is now prohibited under the Anti-trust Laws of this State and/or the laws prohibiting and defining trusts, monopolies and/or conspiracies in restraint of trade.

APPENDIX B

Art. 6050.

1. Producing or obtaining, transporting, conveying, distributing or delivering natural gas: (a) for public use or service for compensation; (b) for sale to municipalities or persons or companies, in those cases referred to in paragraph 3 hereof, engaged in distributing or selling natural gas to the public; (c) for sale or delivery of natural gas to any person or firm or corporation operating under franchise or a contract with any municipality or other legal subdivision of this State; or, (d) for sale or delivery of natural gas to the public for domestic or other use.

2. Owning or operating or managing a pipe line for the transportation or carriage of natural gas, whether for public hire or not, if any part of the right of way for said line has been acquired, or may hereafter be acquired by the exercise of the right of eminent domain; or if said line or any part thereof is laid upon, over or under any public road or highway of this State, or street or alley of any municipality, or the right of way of any railroad or other public utility; including also any natural gas utility authorized by law to exercise the right of eminent domain.

APPENDIX C

Rule 30. Gas Nominations Required.

(A) Initial Purchasers

All first purchasers of gas produced from wells shall file by the ninth (9th) day of each month nominations (Form GN) of requirements for gas to be used by them from each reservoir during the following month. Purchasers who gather gas from various gas fields and reservoirs or who purchase gas at the wellhead of the wells or purchase gas at a common purchase point must determine if they are the initial purchaser and, if so, shall file gas nominations *(Form GN)*. An operator using gas-well gas for his own operations, either on leases or in a fuel system, shall file gas nominations *(Form GN)*. Operators of processing plants who operate field gathering systems and who are the purchasers of gas at the wellhead shall file gas nominations *(Form GN)*.

(B) Producer's Forecast

The operator of one or more wells in a reservoir for which an allocation formula has been adopted must submit Producer's Forecast *(Form PF)* by the ninth (9th) day of each month for gas to be produced during the following month. A new operator in a reservoir for which a proration schedule has been issued must submit a Producer's Forecast *(Form PF)* by the ninth (9th) day of the month following the month in which his first allowable is assigned. Each operator in a reservoir for which a proration schedule has not been issued must submit a Producer's Forecast *(Form PF)* when directed by the Commission or by the ninth day of the month preceding the month of schedule.

APPENDIX D

Art. 5049e.

Anti-trust laws unaffected

Sec. 19. It is especially provided that nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly Statutes of this State, and that no provision of this Act shall in any manner directly or indirectly authorize a violation of such anti-trust and/or monopoly Statutes, and in this connection it is hereby declared and especially provided by the Legislature of the State of Texas enacting this legislation that notwithstanding the provisions of any other sections of this Act, it is the legislative intent that no provision of this Act shall in any manner affect, alter, diminish or amend any provision of the anti-trust and/or monopoly Statutes of this State, or in any manner authorize a violation of such anti-trust and/or monopoly Statutes; and it is further especially provided that if any provision of this Act shall be so construed by any Court of this State as to in any manner affect, alter, diminish, or modify any provision of the anti-trust and/or monopoly Statutes of this State, then in that event any such section, sub-section, sentence, or clause or any provision of this Act so construed as conflicting with said monopoly and/or anti-trust Statutes, is hereby declared null and void rather than the anti-trust and/or monopoly Statutes of this State. The legislative intent herein expressed is to prevail and take precedence over the provisions of any other section or sections of this Act, regardless of any statement therein to the contrary.

APPENDIX E

The Court's instruction to the jury, pages 3299-3301, 3303, 3308 and 3310.

"The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage to the fullest extent practicable free and open competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry; all to the ultimate end that the consuming public might be able to receive better goods and services at lower costs. It was not the intent or purpose of the Act to embrace every conceivable contract or combination which could be made concerning trade or commerce and to thereby make any act done anywhere in the whole field of human activity to be illegal, but it was the purpose to make those acts and contracts and combinations illegal which unduly restrained trade *and to forbid all contracts or acts which had a monopolistic tendency and which unduly interfered with the natural flow of an appreciable amount of interstate commerce.* The courts have always recognized that there are some types of agreements whose validity were the result of surrounding circumstances. In this area the criteria adopted by the Courts in any given case for the purpose of ascertaining if violations have been committed is the rule of reason. Therefore, the Courts are conscious of the fact that the freedom of the individual to contract when not unduly or improperly exercised is the most efficient means for the prevention of a monopoly, because the right to freely contract is the means by which a monopoly would be inevitably prevented. In other words, the freedom to contract was and is the essence of freedom from undue restraint on the right to contract."

> "The amount of quantity or value of the interstate commerce involved or affected by an unreasonable restraint of trade is immaterial. The Sherman Antitrust Act brands as unlawful any contract or combination or conspiracy, which would operate to restrain unreasonably any interstate trade and commerce, regardless of how small in amount or quantity or value."

The court then defined monopoly:

> "The word 'monopolize,' as used in the Sherman Antitrust Act means the power possessed by a combination or conspiracy formed with the intent either to obtain, or to maintain, the power to remove or exclude competitors from the field of competition in a particular business or industry."

And lastly on this question the court stated:

> "You are instructed that when any one has acquired a natural monopoly by means which are neither exclusionary, unfair, or predatory, he is not disempowered to defend his position fairly."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1712~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1712

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, pursuant to Rule 24.4 of this Court, address the following memorandum on a relevant writ granted since the filing of the petition and the following reply to arguments first raised in the brief in opposition to the Petition.

I.

Certiorari Has Been Granted in The Closely Related Trucking Unlimited vs. California Motor Transport Co. Case

On June 1, 1971, this Court granted a writ of certiorari to the Ninth Circuit in the case which is now styled in this court, California Motor Transport Co. v. Trucking Unlimited, No. 1419, October Term 1970. The opinion of the Court of Appeals is found at 432 F.2d 755. That case is one in which, as here, the Court of Appeals has made serious inroads upon the law as declared by this Court concerning the status of governmental action under the antitrust laws and involves one of the same questions raised in the petition at bar. The Ninth Circuit decision was relied upon by the Fifth Circuit in the present case.

Respondents here rely upon the opinion of the Ninth Circuit asserting that the trial court there, in dismissing the case because of the application of the *Noerr-Pennington* rationale, had noted that there were no allegations that any false, misleading or insupportable representations had been made to the governmental agencies which were concerned in that case. Respondents argue that the allegations of false nominations to the Railroad Commission in the case at bar makes this even a stronger case against application of the *Noerr-Pennington* rationale. The Court will recall, however, that *Noerr* and *Okefenokee,* which was approved by this Court in *Pennington,* expressly hold that even false representations concertedly made for the purpose of procuring governmental action which is detrimental to competition cannot form the basis for antitrust liability.

Indeed, the Ninth Circuit in *Trucking Unlimited* viewed the case at bar as being properly within the application of the *Noerr-Pennington* rule even though it did not so regard the case before it. The Ninth Circuit indicated approval of the trial court's partial summary judgment in the instant case which it equated with Okefenokee stating in footnote 7 at 432 F.2d 760 as follows:

> "In Okenfenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F. Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action."

The matter of the impact of the antitrust laws upon the many ways in which joint action may be taken by citizens, both real and corporate, to bring about governmental action at whatever level, whether local, state or federal and whether legislative, executive, or judicial, or administrative, is one with ramifications of great magnitude and importance not just to the entire business community but also to the right of all citizens to petition to government and the functioning of government at all levels. It is respect-

fully urged that this Court grant the writ to prevent the erosion of the salutary principles laid down in *Noerr, Pennington,* and *Okefenokee,* and consider this case along with the Ninth Circuit case which it is to hear.

II.

Fraudulently Procured Patents Are Not Analogous To The Case At Bar.

It is easily demonstrated that the reliance of Respondents and the court below upon *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,* 382 U.S. 172 (1965), is entirely misplaced. In that case this Court reversed the dismissal of a counterclaim which asserted a violation of § 2 of the Sherman Act based upon an allegation, taken to be true, that a patent which the Plaintiff had sought to enforce against the defendant had been obtained from the Patent Office by deliberate fraud. This Court held that the procurement of a patent by deliberate fraud would strip the patentee of its protection from the application of antitrust by the lawful patent monopoly. This Court went on to hold, moreover, that obtaining a patent by fraud does not necessarily create a per se violation of the antitrust laws and that where monopolization or attempt to monopolize are charged, a plaintiff must show that the party charged has the requisite exclusionary power in a properly defined relevant market so as to measure the effect upon competition.

Walker Process and similar cases lend no support to Respondents' position because the exemption of the monopoly from the antitrust laws was entirely dependent upon the patent and the lawful monoply created thereby. When the patent was invalidated because of fraud in its procurement, the monopoly losts its exempt status. No parallel or analogous situation exists here. Respondent Woods did not seek to invalidate the gas production allowables based upon the alleged false producers' forecasts of Petitioners

as could have been done. Woods made no effort to bring the matter or producers' forecasts or allowables to the attention of the Railroad Commission nor did he seek relief from the allowable production orders of the Commission in the courts of the State of Texas as he was permitted to do. Sec. 24, Art. 6008, Tex. Rev. Civ. Stat., Appendix p. 152. As pointed out at pages 21 and 22 of the petition, the Railroad Commission was fully cognizant of all that transpired in the Appling Field and the effect of its allowable production orders. Until those orders were invalidated under the procedures provided by the statutes of Texas, they remained valid and subsisting. Such valid orders are directly within the rule of *Parker* v. *Brown/Noerr-Pennington* so that any injury to Respondents suffered as a result of such orders is not compensable under the antitrust laws.

III.

The Jury Made No Finding Whatever Concerning The Relevant Market.

The argument of Respondents that the issue as to the relevant market was submitted to the jury by the definition of moncpoly in the charge of the court and in the wording of special interrogatory No. 2 is sheer sophistry, which completely perverts the record. The trial court, in its charge, did define the word "monopolize" as quoted at page 24 of Respondents' brief. However, immediately following that definition the court proceeded to instruct the jury that:

> "The offense of monopoly under Section 2 of the Sherman Antitrust Act has two elements:
>
> (1) The possession between defendants of monopoly power *in the relevant market, in this case the production, transportation and marketing of gas out of the Appling Field,* and
>
> (2) The willful acquisition or maintenance of that power is distinguished from growth or development

as a consequence of a superior product, business acumen, or historic accident." (Tr. 3308).

The interrogatory submitted to the jury inquired:

> "Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or anyone of them, or either of them, to monopolize any appreciable part of the trade and commerce of *drilling for, producing, and transporting gas from the Appling Field?*" (Appendix p. 41). [Emphasis supplied].

Thus, it is clearly seen that the trial court did not attempt to define for the jury what is meant by "relevant market" nor did it submit any issue to the jury which would elicit a finding from the jury on the areal extent of the relevant market or as to whether the Appling Field was in fact a relevant market. The charge to the jury on the contrary instructed them that "production, transportation and marketing of gas out of the Appling Field" constituted the relevant market as a matter of law. The Court of Appeals, in effect, reinstates the erroneous submission to the jury. As pointed out in II of the argument in the Petition, the Appling Field is not a market at all, either relevant or irrelevant, and in the absence of proof of unlawful economic power in any market, Petitioners are entitled to judgment or, at the very least, Petitioners are entitled to a determination by a jury as to the true extent of the area in which their market power is to be tested or as to whether the Appling Field is in fact a relevant market.

IV.

The Court of Appeals Did Not Remand Simply for a Trial of Damage Issues.

Respondent asserts in part III that the verdict of the jury disposed of any question as to the liability issue in the case and that the Court of Appeals remands only for a determination of whether or not the Petitioners filed false "nominations" and, if so, the amount of damages suffered

by Respondents as a result thereof, and for determination of the amount of damages suffered by reason of Respondents' failure to proceed with plans for a liquid extraction plant. This is not what the Court of Appeals has ordered. In its opinion dated March 17, 1971, on the petition for rehearing and petition for rehearing en banc, the Court of Appeals said, construing its own prior opinion:

> "Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts shall encompass all those issues which are associated with antitrust actions." (Appendix p. 96).

Thus, it seems clear that the Court of Appeals, at least as to matters pertaining to the alleged filing of false producers forecasts, directs a full trial including issues as to whether or not Petitioners have committed any violation of the Sherman Act with respect to this aspect of the case. Indeed the opinion below must be subject to the same interpretation as to the failure of Respondents to realize their alleged hopes for the construction of a liquids extraction plant because this part of the case and the evidence as to it has never been submitted to or passed upon by the jury.

The apparent trifurcation of this case by the Court of Appeals is improper for two compelling reasons. First, if the facet of the case dealing with nominations is so distinct that it may be tried separately as a separate cause of action on both issues of liability and damages, it is the only portion of the case upon which Respondents should ever have been able to proceed. This is so because the claims concerning nominations were the only claims asserted in the suit until the claims concerning the construction of the pipeline, for which the jury found damages, and the claims concerning a liquids extraction plant were added in the second amended complaint, after the statute of limitations had run.

Second, a necessary element of a claim under the antitrust laws is injury to the plaintiff. The injury suffered must be the proximate result of the unlawful conduct. If this case is actually a single cause of action, none of which is time barred, the alleged liability creating conduct is completely interwoven with the claims of injury and damage. The jury which brought in the verdict which the Court of Appeals would reinstate did not hear evidence as to the real effect of regulation of production by the Railroad Commission, i.e., that Respondents were allowed to drain away and confiscate vast quantities of Petitioners' gas. Nevertheless, the total effect of such regulation and resulting drainage would be a necessary part of the *whole case*, including the portion of the case which was tried and as to which the Court of Appeals sought to award damages. A jury which hears all of the evidence could well conclude that Respondents have suffered no injury whatever on the whole case or any part of it.

Such a situation is governed by the express holding of this Court in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), stating the rule governing partial new trials to be:

> "Where the practice permits a partial new trial it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See Norfolk Southern R. Co. v. Ferebee, 238 U.S. 269, 274; American Locomotive Co. v. Harris, 239 Fed. 234, 240; Simmons v. Fish, supra, p. 568; McBride v. Huckins, 76 N.H. 206 213; 81 Atl. 528; General Motors Co. v. Shepard Co., 47 R. I. 153, 156; 130 Atl. 593; LeFebvre's Administrator v. Central Vermont Ry. Co., 97 Vt. 342, 358; 123 Atl. 211. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

Petitioners urge this Court to condemn this fragmentation of this case into three parts on both liability and damage issues as a radical departure from the rulings of this Court and accepted practice.

V.

Respondents Have Not Been Injured In Their "Business or Property."

The verdict based on the alleged lost pipeline contract, which the Court of Appeals would reinstate, and the additional damages which it would allow on a trial of issues concerning the alleged loss of a liquids extraction plant contract have no legal foundation because loss of such alleged contracts do not constitute injury to "business or property" under the antitrust laws. This is so because the claimed contract with Lumar for shared pipeline facilities and a possible shared liquids extraction plant was found by the jury to be a forgery. Alleged oral agreements between Woods and Garver Oil & Gas Equipment Company, Marler Construction Company and Sinclair Oil & Gas Company, referred to at page 15 of Respondents' brief, would fall within the proscriptions of the statute of frauds as would the nonexistent agreement with Lumar or any claimed oral agreement with Lumar preceding the forged contract. Such entirely inchoate and unenforceable arrangements, hopes, or plans do not rise to the level of "business or property." In *Martin* v. *Phillips Petroleum Company*, 5 Cir., 365 F.2d 629, cert. den., 385 U.S. 991, rehearing den., 386 U.S. 930, a similar situation was before the court below. There the court held that neither an agreement which was a nullity under the applicable statute of frauds nor inchoate negotiations constituted business or property within Section 4 of the Clayton Act, 15 U.S.C. § 15. In its opinion in the case at bar the Court of Appeals seeks to distinguish its prior holding in *Martin* on the evidence. Petitioners, nevertheless, are confident that if the writ is granted they can demonstrate that there was insufficient evidence to

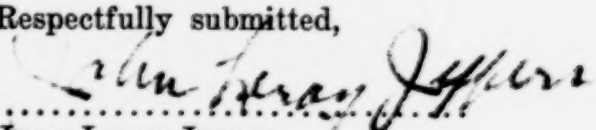
allow the jury to speculate upon the degree of preparedness of Respondents to enter the business of owning and operating a liquid extraction plant and that the trial court correctly followed controlling precedent in refusing to submit the matter to the jury.

CONCLUSION

To allow the decision of the Court of Appeals to stand would be to perpetuate a miserable miscarriage of justice which would undermine this Court's holdings in *Parker* v. *Brown* and *Noerr-Pennington*, eviscerate the antitrust laws of a meaningful statute of limitations, allow piecemeal trials of a fragmented case preventing Petitioners from ever obtaining a fair trial upon the entire case contrary to the law as announced by this Court, and judicially reward the Respondents pillage of Petitioners' Appling Field gas reserves with treble damages never actually incurred.

The petition should be granted and the decision of the trial court restored.

Respectfully submitted,



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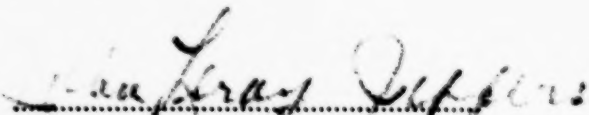
CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply of Petitioners to Brief in Opposition to Petition for Writ of Certiorari were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this 4 day of August, 1971, thus serving all parties required to be served.



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IN THE

Supreme Court of the United States

OCTOBER TERM—1971

NO. ~~1719~~ 70-173

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,
v.
WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENTS' REPLY TO PETITIONERS' BRIEF FILED AUGUST 4, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM—1971

NO. 1712

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' REPLY TO PETITIONERS' BRIEF FILED AUGUST 4, 1971

Claiming First Amendment protection, Petitioners insist that the activities which Respondents charge they have engaged in, i.e., the filing of false and perjured nominations in order to lower Respondents' allowables, cannot constitute a basis for an antitrust action. Petitioners ignore

the basic difference between activities seeking to influence programs and policies of government or its agencies charged with the duties to enact regulations pursuant to law and the filing of false and perjured nominations before such agency, not to influence a change of policy or regulation, but pursuant to a conspiracy and monopoly or attempt to monopolize for the express purpose of subverting such regulations in order to injure Respondents in their business and property. These are the glaring distinctions which Petitioners' able counsel in their advocatory zeal refuse to recognize.

As Judge Ingraham so well put it in this very case, 36 F.R.D. 107 at Page 111:

> "If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behavior. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr."

And as further noted by Judge Ingraham:

> "If, after a trial, the conspiracy were established and relief were granted, any order of the Railroad Commission would still stand."

Additionally, the Texas Courts charged with the duty of interpreting and passing upon the validity of the laws

dealing with precisely the same question and between the same parties have held that Respondents' pleadings alleging violation of the Texas Antitrust Law by reason of Petitioners filing of false nominations state a cause of action under the applicable laws. *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 382 S.W.2d 343 (1964) writ ref. n.r.e.

In the state court case, as here, Petitioners insisted that their filing of false and perjured nominations were for the purpose of influencing governmental action of such commission in fixing gas production allowables which they argued, as a matter of law, cannot constitute a violation of the Texas Antitrust Statute or form the basis or subject matter of an antitrust damage action, relying, as they do here, on Noerr and Okefenokee. The Texas Court, as did the Fifth Circuit, rejected their contention, citing Continental Ore and others. Once the difference between:

1. Subversion of the effects of the proration formula by filing false production and market forecasts; and

2. Attempts to influence the establishing or changing the rules or regulations, or the enactment of laws, are understood it becomes clear that [1] is not protected activities and [2] is. Only [2] may not form the basis of an antitrust action. This is precisely what Noerr and Pennington teaches.

The First Amendment does not provide the same degree of protection to commercial activities, especially when such activities are tainted by perjured and false nominations, that it does attempts at political persuasion. *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Breard v. City of Alexandria,* 341 U.S. 622, 641-643, 71 S.Ct. 920, 95 L.Ed. 1233 (1951);

and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1970). Cert. denied 400 U.S. 850, 91 S.Ct. 54.

This is in line with the holding of the Texas Courts and the specific provisions of Section 13, Article 6049 V.A.T.C. dealing with the conservation of petroleum, oil and natural gas and the duties of the Railroad Commission, which sets out that nothing in the regulatory scheme enacted by the legislature regulating the oil and gas industry, shall in any manner affect, alter, diminish, change or modify the antitrust and/or monopoly statutes of this state, etc. Art. 6049a, Sec. 8bb; Art. 6049d, Sec. 13; and Art. 6049e, Sec. 19 of Vernon's Texas Civil Statutes. Appendix (in Respondents' Reply to Petitioners' Application for Writ of Certiorari, page 19).

The fact that the Ninth Circuit in *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, cited Judge Singleton's opinion in the case at bar, 284 F.Supp. 582, is of no great persuasion. Under the clearly stated facts by the Fifth Circuit, after careful examination of the factual posture as portrayed in 3,457 pages of testimony and full briefs by the parties in interest approved Judge Ingraham's holding in 36 F.R.D. at page 111. See also *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (C.A. 1st Cir. 1970) Note 8.

The distinction sought to be made by the Petitioners in seeking to differentiate between the basic principles set out by *Walker Process Equipment v. Food Machine & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, and in the case at bar is a distinction without a difference. In both cases the gravamen of the offense was fraud and deceit and in both cases such deceit nullified the claimed pro-

tection under the First Amendment and their insulation against the antitrust laws. In order to prosecute their cause of action in this case Respondents were not required, nor could they, call this wrong to the attention of the Railroad Commission; *Foree v. Crown Central Petro. Corp.*, 431 S.W.2d 312 (Tex. S.Ct. 1968). The Texas Court has held that Plaintiffs' allegations as to perjured nominations stated a cause of action under the antitrust laws. *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 382 S.W.2d 343.

In *Trucking Unlimited,* supra, there are two questions which do not exist in the case at bar:

1. Whether agreements to utilize judicial and administrative adjudicative processes justify immunization against antitrust violations when

2. Unaccompanied with allegations that Defendants' presentations to the governmental agencies and the Court were in themselves false, misleading or lacking in evidentiary or legal support. Not so in the case now before this Court.

Respondents in this action do not seek the thousands of dollars spent by them to answer the numerous unwarranted actions instituted by Petitioners against them before the Railroad Commission nor the courts, nor have Petitioners alleged or sought to prove such actions as a basis for antitrust violations. Respondents' cause of action as to the perjured nominations are limited to the losses sustained by Respondents by reason of the subversion of such rules pursuant to Petitioners' antitrust activities.

It is respectfully submitted that the opinion of the Court of Appeals is clear and explicit and needs no further clarification from any of the parties to this litigation.

Briefly, the Court of Appeals sets out the remaining and unresolved issues as follows. Whether Petitioners, pursuant to the jury found antitrust violations, filed false nominations and if so, what damages, if any, Respondents sustained. During the trial of such issues Petitioners will have full opportunity to prove, if they can, that Respondents did not suffer any damages and/or they produced more gas than Petitioners would have produced had Respondents filed honest nominations. The parties stipulated that there was no waste, that is, no gas produced by Respondents was produced for unlawful purposes (R. 1991). All other matters contained in Petitioners' reply have previously been fully dealt with in both Petitioners' Application for Writ and Respondents' reply.

Finally, Petitioners, as in their Application for Writ of Certiorari in this Court reiterate their complaint of the Appellate Court's action in reinstating the verdict on:

1. The loss of the pipe line contract; and

2. The ordering of a trial on the issue of damages flowing from Petitioners' claimed conduct with regard to the extraction plant.

As to [1]—The issue has been clearly dealt with by the Court of Appeals and presented to this Court in Petitioners' Application for the Writ and Respondents' Reply in Opposition.

As to [2]—Petitioners' interference with Respondents' contract, pursuant to the conspiracy is actionable both under *Martin v. Phillips Petroleum Company,* 365 F.2d 629, where even under Louisiana Law, under the facts in this case, a cause of action exists as part of the antitrust violation, and under Texas Law. *Clements v. Withers,* 437 S.W.2d 818 (S.Ct. of Tex. 1969). There can be no question that a cause of action has been asserted.

CONCLUSION

Petitioners, who after a long trial consuming more than one month having been found in violation of the Antitrust Laws of the United States seek a second bite at the apple. The decision of the Court of Appeals is sound and in accordance with established law. Respectfully this case does not call for a review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served, on the 23rd day of August, 1971, on Messrs. Vinson, Elkins, Searls & Smith, First City National Bank Building, Houston, Texas 77002, attorneys for Petitioners by placing the same in a properly addressed envelope, postage prepaid, and depositing the same in the United States mail.

Arthur J. Mandell

ARTHUR J. MANDELL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1712~~ 70 - 173

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ANSWERING RESPONDENTS' REPLY BRIEF OF AUGUST 23, 1971

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FIDELITY PRINTING COMPANY, INC., HOUSTON

In The

Supreme Court of the United States

October Term, 1970

No. 1712

Aluminum Company of America, et al,
Petitioners,

v.

Woods Exploration & Producing Company, Inc., et al,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ANSWERING RESPONDENTS' REPLY BRIEF OF AUGUST 23, 1971

Respondents have, in their brief of August 23, 1971, raised new arguments which were not a part of their brief in opposition to the Petition thus necessitating this supplemenal brief in behalf of Petitioners.

I.

This Court Need Not Face Any Question of Constitutional Law in Deciding This Case.

The case at bar presents a situation quite similar to that in *Noerr* where this Court recognized the existence of serious questions whether the conduct there complained of might be protected by the First Amendment but found it unnecessary to consider such questions because of its construction of the Sherman Act. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 132 n. 6. That construction of the Sherman Act was that where injury is suffered because of governmental action, the Act simply does not apply even

though falsehood or deception may have been conspiratorily employed to bring about the governmental action which caused the injury. Respondents' repeated assertions that Petitioners stand on claimed First Amendment protection is but a studied effort to avoid the simpler and more basic proposition that the antitrust laws simply do not reach Peitioners' attempts to influence governmental action so that the constitutional question is never reached. Decisions such as those cited by Respondents upholding municipal ordinances regulating commercial activities against claims of First Amendment protection have nothing whatever to do with this Court's proper construction of the Sherman Act.

There is nothing in the decisions in *Noerr, Pennington, Parker* v. *Brown, U.S.* v. *Rock Royal Coop* or *Okefenokee* which limits the doctrine therein announced to situations in which efforts are made to influence policy or changes in rules, regulations or laws as the court below has done. There is nothing in the decisional language or logic of these decisions which excludes administrative or quasi-judicial action. Even if such a limitation was supportable, it is difficult to conceive in what manner the monthly production allowable orders promulgated by the Railroad Commission can be distinguished from any other legislative or quasi-legislative rule or regulation or like action under delegation by state statutory law.

It may be true that one injured by a violation of a Railroad Commission order by another party need not first apply to the Commission for relief before going into court to recover any damages sustained. This proposition and cases supporting it cited by Respondents have nothnig to do with the present controversy. Respondents do not complain of a violation of any Commission Order by Petitioners — they complain that the valid orders of the Commission restricted their production of gas from the Appling Field.

The Texas statutes provide a method for relief in such situations which Respondents have wholly failed to recognize or utilize. Under the terms of Article 6008, Sec. 24, Tex. Rev. Civ. Stat.:

> "Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission . . ." (Appendix, p. 152);

and under Article 6049c, Sec. 8, it is further provided:

> ". . . In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The plain undisputed facts are that Respondents' gas production was limited only by valid orders of the Texas Railroad Commission acting upon full knowledge and awareness of what was transpiring in the Appling Field. Under the controlling decisions of this Court, the Court of Appeals has greviously erred in applying the Sherman Act to these facts.

II.

The Petition in this Case Presents a Broader Question under Noerr Than Does Trucking Unlimited.

Throughout the proceedings in this case there has been no proof that Petitioners ever actually presented what could be properly called false nominations to the Railroad Commission for consideration in determining the monthly allowable production from the Appling Field. The procedural posture of the case, however, requires that these allegations of Respondents be taken as true. Petitioners, there-

fore, respectfully urge the Court to grant the writ so that the full scope of *Noerr* and related decisions may be vindicated and reaffirmed as applying to governmental action even when such action may be based upon falsehood or deceit. Whether the courts of appeals are to be allowed to erode the scope of *Noerr* and *Pennington* so as to destroy its application in such a situation is not before this Court in No. 1419, October Term 1970, *California Motor Transport Co.* v. *Trucking Unlimited*, in which certiorari has been granted. That case like this one involves the point of the application of the *Noerr* principle to administrative and quasi-judicial action of government but does not present the point as this case does of *Noerr* application to cases of alleged false representations to the government agency.

III.
Absence of Factual Determination of Relevant Market Precludes Fragmenting Case by Remand for Damage Determination Only.

If Respondents' efforts to sustain the Court of Appeals' fractionating of a single antitrust cause of action* into separate segments to be separately tried was not precluded by the four-year limitations ban in Section 5(b) of the Clayton Act, which it is, affirmance of a separate pipeline damage segment, remand for trial on damages only of a splintered off extraction plant segment, and remand for full and separate trial of the alleged false nominations portion would nevertheless warrant Supreme Court review for two reasons:

(1) The attempted piecemeal procedure of trying a single cause of action* in fragments, instead of on the entire

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* The case must be regarded as a single cause of action to avoid the limitations bar by relation back of amended complaints because the false nominations only were sued upon in the original complaint and the pipeline segment and the extraction plant segment were not added by amended complaints until long after expiration of the four-year bar.

evidence as to all issues of liability and damages *on the whole case at one time,* would be such a radical departure from established federal procedure as to deny petitioners a fair trial of the entire case and to engraft an abhorrent and confusing splintering doctrine into federal trial procedure.

(2) There has never been a factual determination in the case of the relevant market as to which the Section 2 monopoly finding is sought to be applied, but instead the Court of Appeals has held *as a matter of law — with no evidence to say nothing of uncontroverted evidence to support it* — that the single small Appling Gas Field in which no gas was marketed is the relevant market. Petitioners filed and presented written requests to the trial court before its instructions to the jury that a fact issue be submitted as to the identity of the relevant market or as to whether the Appling Field was the relevant market. These requests were denied and Petitioners objected and excepted to failure to submit the requested issues and to the trial court's instructing the jury as a matter of law that the Appling Field was the relevant market — again before such instructions had been given. After the instructions and after verdict the trial court decided that such instructions were erroneous and that as a matter of law the Appling Field was not a relevant market. The Court of Appeals reinstated the acknowledged error of the trial court and thereby denied Petitioners their very minimum right of a fact finding by the jury on the relevant market issue. The single cause of action and every splintered segment of it are each and all dependent upon a proper relevant market finding.

The drastic precedent that a single small gas field in which no gas is marketed is a relevant market is totally oblivious to the economic realities of the oil and gas industry, in which single oil or gas fields are typically owned and

operated by a single company out of economic and industrial necessity. This aberrant holding not only renders literally hundreds of such fields Section 2 Sherman Act monopolies but graver still has the disruptive effect on established antitrust jurisprudence of judicially establishing that a small non-market unit in any industry may be held a relevant market for Section 2 monopoly purposes as a matter of law.

Conclusion

Petitioners pray that the writ be granted on all points and that the judgment of the trial court be affirmed.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Supplemental Brief of Petitioners Answering Respondents' Reply Brief of August 23, 1971 were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this ..... day of September, 1971, thus serving all parties required to be served.

.....

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WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,

Respondents.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Respondents.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, pursuant to Rule 24(5) of this Court, request leave to file this supplemental memorandum in support of their petition in order to bring to the attention of the Court the recent very relevant decision of the United States Court of Appeals for the Fifth Circuit in *Household Goods Carriers' Bureau* v. *John J. Terrell.*

A copy of this November 22, 1971 decision is printed as an appendix to this memorandum.

This late decision by the Fifth United States Court of Appeals seems in clear conflict with its own prior decision in the present case in which the petition is pending on the application of the principle of this Court's decisions in *Eastern Railroad Presidents Corp.* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The *en banc* majority

opinion reversed and remanded an antitrust treble damage award because of "a flood of evidence tending to show attempt by both parties to influence the respective government agencies" even though the trial court had provided by pretrial order and had further instructed the jury that:

> Plaintiff cannot recover and you will not allow any damages in this case for any injury or damages which was caused, or is alleged to have been caused, by any action of the Finance Center, Defense Transportation Management Service, or any other agency of the United States of America.

The reversal was because "the above quoted instructions" were not deemed "sufficient to overcome the substantial likelihood" that the jury would and in fact did award damages based upon the evidence of attempts to influence governmental action. A separate opinion by Judges Ainsworth, Bell and Simpson concurred in reversal on the damage issue but would also reverse on the liability issue because: "The evidence relating to efforts of the parties to influence government agencies is inadmissible in view of the *Noerr-Pennington* rule that such activities are exempt from the provisions of the Sherman Act". Eleven of the fourteen judges sitting *en banc* joined in reversal of damages because of admission of evidence concerning concerted influencing of governmental action *by an administrative agency of the United States Department of Defense* even though the jury had been instructed not to award any damages for injury caused by action of a government agency.[1] This later *en banc* action by the Fifth Circuit is directly contrary to the earlier decision of its three-judge panel in the present case which reversed and remanded issues of both liability and

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[1] Judge Goldberg who wrote the opinion in the case now before the court was one of the three dissenting judges who would have affirmed the case both on liability and damages.

damages in an alleged cause of action predicated *exclusively* on claimed concerted attempts to influence the Railroad Commission of Texas in fixing the gas production allowables and seeking damages based *solely* on the gas production allowables fixed by such government agency. Furthermore, the Goldberg opinion in these petitioners' case is predicated at least in part on the cited holding in *Trucking Unlimited* v. *California Motor Transport*, 432 F.2d 744 (9th Cir. 1970), now under submission to this Court, that the *Noerr-Pennington* rule does not apply to attempts to influence *administrative* or *adjudicative* action by governmental agencies. This attempted limitation on the *Noerr-Pennington* principle embraced by the Fifth Circuit panel in *Woods* is now clearly repudiated by eleven judges of the Fifth Circuit in this later *en banc* decision.

The *en banc* majority opinion seeks to distinguish its holding from what it describes as "the recent cases interpreting the *Noerr-Pennington* doctrine which appear to indicate that joint efforts by parties who, for anti-competitive purposes, seek to undermine, subvert, or circumvent the efficacy of established governmental policies are not necessarily immunized from prosecution under the Sherman Act", citing among others the *Woods* v. *Aluminum Company* and *Trucking Unlimited* v. *California Motor Transport* cases.[2] This totally new and different statement of the holding in these two cases runs counter to and is negated by its own quotation from *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose". 381 U.S. at 670.[3]

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[2] See footnote 18. The footnote further evidences the *en banc* majority's recognition that the decision of its panel in *Gaslight Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971) is not in accord with the decision of its other panel in *Woods*.

[3] See footnote 15.

The petition for certiorari in this case should be granted, among other reasons, in order to permit resolution of the conflict between the decisions on the *Noerr-Pennington* principle in the Court of Appeals from which this case comes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Supplemental Memorandum of Petitioners in Support of Petition for Writ of Certiorari were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this ..... day of December, 1971, thus serving all parties required to be served.

.....

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Counsel for Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25989

HOUSEHOLD GOODS CARRIERS' BUREAU,
Defendant-Appellant,

versus

JOHN J. TERRELL,
Plaintiff-Appellee,

JOHN J. TERRELL,
Plaintiff-Appellant,

versus

AERO MAYFLOWER TRANSIT, CO. INC., ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Texas

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(November 22, 1971)

Before BROWN, Chief Judge, and JONES, WISDOM, GEWIN, BELL, COLEMAN, GOLDBERG, AINS-

WORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK and INGRAHAM, Circuit Judges.*

GEWIN, Circuit Judge: Pursuant to Rule 35 of the Federal Rules of Appellate Procedure this private antitrust action was placed en banc by the Court. The original trial resulted in a jury verdict in favor of the plaintiff, John J. Terrell, and against the defendants, Household Goods Carriers' Bureau (hereinafter Household Goods or the Bureau) and ten individual carriers in the amount of $375,000 (trebled to $1,125,000). The trial court entered judgment on the verdict against the Bureau but entered judgment notwithstanding the verdict in favor of the individual carriers. The majority of the panel that originally heard the case on appeal vacated the judgment against the Bureau and remanded the case for a new trial.[1] Upon rehearing en banc, the majority of this court is of the opinion that the judgment entered by the trial court against the Bureau should be affirmed on the issue of liability but reversed and remanded on the issue of damages. Since the intricate and voluminous facts of this case were fully developed in the majority and dissenting opinions of the original panel, we present only a skeletal outline.

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*Judges Thornberry and Roney did not participate in the consideration of this case.

[1]Household Goods Carriers' Bureau v. Terrell, 417 F.2d 47 (5th Cir. 1969). The judgment n.o.v. in favor of the individual carriers is not before us. It was unanimously affirmed by the original panel and is not contested by either party on rehearing en banc.

I

Plaintiff-appellee Terrell developed and attempted to market a national "mileage guide" for use in quickly computing the highway mileage between over 775 "keypoints" — cities, towns, and military bases in the United States and Canada. A guide of this nature is commercially marketable for such commonplace but important computations as rates to be charged by freight haulers or movers of household goods; travel allowances to be paid to government, military, or civilian personnel by their respective employers; and moving allowances to be paid military families under orders to transfer. Prior to 1961, when Terrell first attempted to market his guide, all or substantially all, national mileage guides in use had been computed, manufactured and marketed by Rand McNally and Company[2] under an agreement with the defendant Bureau.

Household Goods Carriers' Bureau is a trade association and tariff bureau that represents some 1700 members, carriers of household goods; it is organized under the authority of the Reed-Bullwinkle Act[3] and approved by the Interstate Commerce Commission. Through power of attorney executed by each of its members it has authority to file a joint tariff with the Commission. The legality of this arrangement is not disputed. It is the agreement between the Bureau and Rand McNally that provides the foundation for Terrell's antitrust claim. By that agreement the Bur-

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[2]Plaintiffs named Rand McNally as a co-conspirator but did not join them as defendants.

[3]49 U.S.C.A. § 5b.

eau obligated itself to purchase from Rand McNally a minimum number of 22,500 mileage guides at a fixed price; additional guides in excess of the minimum were to be sold to the Bureau or to its members at a discount. In addition, Rand McNally agreed not to sell its guides to other purchasers at a price below the Bureau's discounted price. Many were sold at a higher price. A further agreement gave the Bureau the right to negotiate personally with certain other agencies and reserved to Rand McNally the right to deal with all others. Finally, the Bureau was accorded controlling influence in determining the scope and content of the Rand McNally guides.

Although the Rand McNally guide was the only one on the market, it was noticeably inadequate for many of the purposes for which it was used. A combination of factors caused the guide to show longer than necessary distances between key points.[4] There was evidence to the effect that members of the Bureau and other motor carriers accepted and even encouraged these overstatements because their transportation

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[4]Rand McNally issued a revised guide only every six or seven years; consequently, it failed to reflect the large number of changes in routings and openings of new highways that occurred in the intervening years. The vast majority of these improvements in the highway systems resulted in shortened distances between key points. In addition, distances in the Rand McNally guide were computed only along highways suitable for heavy truck traffic, so a large number of the computations arbitrarily excluded shorter travel routes accessible to automobiles and lighter trucks. As a result of these and other less significant factors, there were said to be some 27,000 inaccuracies in the Rand McNally guide, most of which tended to overstate the distance between points.

charges were computed from the guide's mileage tables. On the other hand, many agencies that pay employees or carriers for travel on a per mile basis showed a preference for a more current guide that reflected the shortest possible reliable distances. In addition, the close relationship between the Bureau and Rand McNally gave the Bureau a degree of control over other elements of the guide, including the designation of "key points." Agencies that made computations involving non-listed points were thus put to the time and expense of making extra computations. A noticeable omission in this regard was the failure of the Bureau guide to provide a convenient means of calculating distances between military bases.

To fill this marked competitive gap came Mr. Terrell with a guide designed to meet the needs of the Bureau's unsatisfied customers. In computing his guide, Terrell included all major roads accessible by automobile. He planned to recompute a new guide every two years from the most recent maps available. In computing all of his distances, he used the shortest reliable figures available; and his guide included a ready means of including over 400 military bases in the computations.

Plaintiff began selling his product in 1961, and found a willing customer in the Oilfield Haulers' Association, a 500 member trade association and tariff bureau whose members transported oilfield machinery. Continued solicitation yielded substantial interest and a highly favorable report from the Finance Center of

the U. S. Department of Defense (Finance Center),[5] despite efforts by defendants to discredit the guide. Early in 1964, plaintiff convinced Rocky Ford Van Lines (Rocky Ford), a Household Goods affiliate, to withdraw from the Bureau and affiliate with the Oilfield Haulers. By using the different and generally lower mileages reflected in the Oilfield Haulers' guide, Rocky Ford sought to introduce competitive rates among the Household Goods haulers.

Accordingly, Rocky Ford began the transfer procedure by informing Household Goods of its desire. The Bureau responded with the "Wyche letter" — a strongly worded letter questioning the accuracy of Terrell's guide, threatening a complaint to the ICC, and stressing the undesirable competitive effects on the industry that would flow from the adoption of a competitive guide. The contents of the letter were passed on to the Oilfield Haulers' Association. Shortly after becoming aware of this letter, plaintiff filed this suit and a related libel suit. The libel suit, which was settled by consent decree, is the basis of a defense of *res judicata* raised by the Bureau on this appeal. Despite the letter, Rocky Ford consummated its changeover to the Terrell guide; and the Oilfield Haulers signed a contract for a revised guide early in 1964. Terrell and Rocky Ford then began a joint effort to convince the Defense Traffic Management Service (DTMS), the government agency which controls the shipment of

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[5]This agency had the authority to adopt Mr. Terrell's guide for use in calculating government per diem travel and transportation allowances.

household goods for military personnel,[6] to accept and act on competitive bids computed from Terrell's guide.

At this stage, Terrell's prospects seemed excellent. He had one tariff bureau as an established customer; the Finance Center had responded favorably to his overtures; and, most importantly, he had an inroad to the influential Household Goods Carriers' Bureau. He was cultivating an ambitious expectation that competitive necessity would require the Bureau's members to accept a guide like his once the impact of Rocky Ford's competition was felt. On the other hand, the Bureau, although nominally only a tariff bureau, had identifiable interests in limiting plaintiff's access to the market. First, as representative and spokesman for its 1700 members, the Bureau was concerned that plaintiff's shorter mileages would bring competition and reduced profits for its members.[7] Secondly, the Bureau itself derived a substantial income through its arrangement with Rand McNally for distribution of the guides.[8]

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[6]Because all rates quoted from the Rand McNally guide were uniform, DTMS used a system of "equitable allocation" whereby qualified carriers were awarded government business on a rotating basis. Rocky Ford sought reinstatement of a system of competitive bidding, based on a government regulation specifying that:

> Only the carriers who provide high-quality service at the lowest overall cost to the Government will be used.

Defense Supply Agency Regulation 4500.1 (Plaintiff's Exhibit 19).

[7]The record shows that in 1960, 95% of the members of the Bureau charged uniform rates.

[8]The Bureau considered receipts from the mileage guide to be important in supplementing its dues. Gross receipts from the guide in 1960 were $87,000. Net revenue was about $50,000.

Shortly after circulation of the Wyche letter, plaintiff's rosy future began to blacken. The Finance Center, with some prodding from the Bureau, reversed its position and decided not to adopt plaintiff's guide. A large scale battle for influence before the DTMS allegedly resulted in a full blown picture of lack of trust and confidence in Mr. Terrell; ultimately, DTMS, working in connection with the Bureau and the Finance Center, refused to interpret the regulation in Mr. Terrell's favor. The Oilfield Haulers defaulted on their contract and began using the Bureau's guide. Frustrated in its attempts to gain competitive advantage in its services for DTMS, Rocky Ford returned to using the Bureau guide. Mr. Terrell was eliminated from competition. The jury found the elimination unlawful and measured the injury to Mr Terrell in the amount of $375,000.

II

A. *The Wyche Letter*

At trial and on the original appeal, appellants took the position that the Wyche letter was inadmissible in its entirety because it had been the subject of litigation in the previously settled libel suit and, therefore, under the doctrine of *res judicata*, was not a proper subject of litigation in a second suit. We cannot accept this contention. The majority of the original panel concluded that subject to the limitations mentioned in the opinion, the letter was indeed admissible in evidence

in the antitrust suit.[9] Moreover, it is well established that in a proper case one wrongful act may be the subject of two or more separate and distinct causes of action.[10] In the instant case, for example, the letter plainly represented the invasion of two separate and distinct primary rights, the one a personal right not to be subjected to libelous statements, and the other a business right to enter competition freely.[11] Thus, we conclude that the letter and its libelous nature were properly admitted to show an intention or a scheme to restrain trade, the prior libel suit notwithstanding.

Appellants vigorously assert, however, that the court committed prejudicial error in failing to exclude the allegedly libelous portions of the letter and in fail-

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[9] "Thus, while the letter was admissible evidence in the antitrust suit, there was present the inherent danger that the antitrust suit would include what, in substance, was a re-trial of the libel case."
417 F.2d at 51 (majority opinion).

[10] Bankers Trust Co. v. Pacific Employers Ins. Co., 282 F.2d 106 (9th Cir. 1960); Atherton v. Anderson, 86 F.2d 518 (6th Cir. 1936); United States v. Pan American Petroleum Co., 55 F.2d 753 (9th Cir.), cert. den. 287 U.S. 618 (1932).

[11] Appellants rely on Nalle v. Oyster, 230 U.S. 165 (1913); Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Englehardt v. Bell & Howell Co., 327 F.2d 30, 33-34 (8th Cir. 1954); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 465-468 (3d Cir.), cert. den. 341 U.S. 921 (1950); F.L. Mendez & Co. v. General Motors Corp., 161 F.2d 695 (7th Cir.), cert. den. 332 U.S. 810 (1947). These cases held that res judicata barred plaintiffs from bringing a second suit based on the same "cause of action" as an earlier suit. In each of those cases plaintiffs were complaining of an invasion of the same right in both suits. Our conclusion in this case that the libel suit and the antitrust suit involve an invasion of two separate and distinct primary rights makes the cited cases inapplicable because a separate cause of action is involved in this suit.

ing to impress upon the jury that damages could not be awarded for any injury growing out of the libel.[12] We agree in part. The original majority found reversible error because the *entire* letter went to the jury as evidence without adequate limiting instructions and after undue emphasis by plaintiff's attorney on its allegedly libelous portions. In our opinion plaintiff's attorney's emphasis on the known falsity of the letter, while entirely proper on the issue of defendants' intent to exclude competition unlawfully, implicitly invited the jury to award damages for the libel. Moreover, we are in agreement with the original majority in their conclusion that the trial court's limiting instruction was not sufficient to alleviate this very real danger that the jury would apply an improper measure of damages.[13]

B. *The DTMS Finance and Center Incidents*

In an attempt to comply with the teaching of *Eastern Railroad Presidents Corp. v. Noerr Motor Freight,*

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[12] Plaintiffs argue for the first time on rehearing that defendants did not properly preserve an objection to admission of the allegedly libelous portions of the Wyche letter. Although we disagree, discussion is not necessary in light of our holding that the letter was admissible in its entirety.

[13] "In the instant case, the danger became reality; the 'false' portions of the Wyche letter were directly and vigorously asserted as a ground for relief in the antitrust suit to such a degree that it cannot be said that the rights created by the dismissal of the libel case were not materially prejudiced." 417 F.2d at 51.
Thus, we agree with the original panel majority that the case has been mishandled and disagree only as to the scope of the prejudice growing out of the mishandling.

Inc.[14] and *United Mine Workers v. Pennington*,[15] the trial court issued a pre-trial order declaring that:

> Plaintiff [Terrell] cannot recover any damages for any injury or damage which was caused or alleged to have been caused by any action of the Finance Center, DTMS, or any other agency of the United States of America....

The order also prohibited counsel for plaintiff from referring without the court's prior consent to any of the dealings between plaintiff or defendants and either of the two government agencies involved. Nonetheless, a flood of evidence tending to show attempts by both parties to influence the respective government agencies was offered with the court's approval after defendants put into evidence a memorandum by the U. S. Army Chief of Finance.[16] The memorandum made numerous accusations to the effect that plaintiff had been "extremely agressive" and had "generally misrepresented the facts" in attempting to influence the Defense Department to accept his guide. All of this

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[14]365 U.S. 127 (1961).

[15]381 U.S. 657 (1965). *Noerr* holds that joint "solicitation of governmental action with respect to the passage and enforcement of laws" cannot be violative of the Sherman Act unless the solicitation "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor...." 365 U.S. at 144. *Pennington* adds that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U.S. at 670.

[16]Earlier, on the second day of trial, the court allowed plaintiff to place in evidence a government report recommending his guide. (Record at 372-74. See 417 F.2d at 52).

evidence was properly admissible in the court's discretion to show the "purpose and character of the transaction under scrutiny",[17] to rebut the insinuations put into evidence by the defendants, and to prove the existence of a conspiracy between the Bureau and Rand McNally. By the terms of the lower court's pretrial order, however, plaintiffs may not recover any damages for business lost as a result of attempts to influence government officials.[18]

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[17] United Mine Workers v. Pennington, 381 U.S. 657, 670-71 n.3; Household Goods Carriers' Bureau v. Terrell, 417 F.2d 47, 61 (5th Cir. 1969) (dissenting opinion).

[18] In this appeal Terrell has properly argued in support of the judgment below that the court was correct in admitting evidence of the D.T.M.S. and Finance Center incidents as circumstantial proof of the purpose and character of the actions of the Bureau and Rand McNally. See Dandridge v. Williams, 397 U.S. 471, 475, 26 L.Ed.2d 491, 496 n.6 (1970). However Terrell also contends that the trial court erred in refusing to permit recovery of damages for these incidents. Such an argument is not in support of the judgment, but is an effort to expand the basis of the judgment to include an element of damage specifically eliminated by the court below. Terrell failed to make or preserve any objection to the court's pre-trial order or the jury instructions which eliminated this element of damage from the lawsuit. His acquiescence at trial coupled with his failure to take a cross appeal on the point preclude his present attack on the court's judgment.

But in any case, considering the totality of the facts and circumstances disclosed by the record, Terrell has not brought himself within the ambit of the recent cases interpreting the *Noerr-Pennington* doctrine which appear to indicate that joint efforts by parties who, for anti-competitive purposes, seek to undermine, subvert, or circumvent the efficacy of established governmental policies are not necessarily immunized from prosecution under the Sherman Act. See. e.g., Woods Exploration & Producing Co. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971); Trucking Unlimited

From our examination of the record, we are critically aware of the absence of emphasis throughout the trial on the important distinction that we have articulated above. Although both sides took pains to argue thoroughly the facts of the alleged attempts to influence, the court and attorneys made only fleeting reference to the limitation imposed by the court's pre-trial order. There was no limiting instruction given upon introduction of the evidence and only a brief paragraph in the court's instruction to the jury cautioning that:

> Plaintiff cannot recover and you will not allow any damages in this case for any injury or damages which was caused, or is alleged to have been caused, by any action of the Finance Center, Defense Transportation Management Service, or any other agency of the United States of America.

In light of the voluminous testimony heard by the jury, we do not think that the above quoted instructions were sufficient to overcome the substantial likelihood that the jury would, and in fact did, award damages for the loss of the government business.

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v. California Motor Transport, 432 F.2d 744 (9th Cir. 1970); Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970); cf. Continental Ore Co. v. Union Carbide and Carbon Co., 370 U.S. 690 (1962). But cf. Gaslight Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971). See generally Costilo, *Antitrust's Newest Quagmire: the Noerr-Pennington Defense*, 66 Mich. L. Rev. 333 (1967); Note, *Application of the Sherman Act to Attempts to Influence Governmental Action*, 81 Harv. L. Rev. 847 (1968).

C. *Proof of Damages*

To prove his damages, plaintiff sought to show by expert testimony the profits lost on account of defendants' unlawful conduct between 1962 and the year of the trial — 1968. In doing so the expert assumed that plaintiff would have sold 22,500 copies of his guide every two years at $15.00 per copy; he arrived at a projected gross income of $1,350,000 for the years 1962-1968 inclusive. From this figure he deducted his projected bi-annual expenses to reflect an anticipated profit of $880,000. The procedure followed is acceptable provided each element of the projection is supported by proven facts. Although generally lenient in allowing damages in antitrust matters,[19] courts must not permit a damage verdict to be based on speculation.[20]

In this case, plaintiff relies on *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*,[21] as justification for adopting as its projected sales volume per edition the minimum number of guides to be purchased by the Bureau as specified in the most recent agreement between Rand McNally and the Bureau. We conclude, as did the original majority, that *Cherokee* is inapposite here. In that case, the plaintiff's participation in the market prior to defendant's illegal activities

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[19] Bigelow v. RKO Pictures, 327 U.S. 251, 264 (1946); North Texas Procedures Assn. v. Young, 308 F.2d 235 (5th Cir. 1962).

[20] Id.; Harrison v. Prather, ____ F.2d ____ (5th Cir. 1970) [No. 29023, December 16, 1970]; Velasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (5th Cir. 1962); Siegfried v. Kansas City Star Co., 298 F.2d 1 (8th Cir. 1968).

[21] 383 F.2d 97 (5th Cir. 1967).

was a special circumstance justifying an inference that "but for" the defendant's illegal activities, plaintiffs would have been in the same position in the market as defendants. In this case, there was proven no special set of circumstances to make valid a similar "but for" proposition. To assume that plaintiff could fully penetrate the Bureau's market is pure speculation and requires the further and totally unsubstantiated assumption that the Bureau would not take competitive steps by revising its own guide or sponsoring a general reduction of rates by its members.

In light of the considerations discussed in this portion of our opinion (Part II) and after an independent examination of the evidence of injury offered by plaintiff, we are of the firm conviction that the record does not reflect evidence properly submitted to the jury that is sufficient to support the sizeable verdict here involved.

> Proof essential to recovery of damages in antitrust litigation has been the subject of many Clayton Act claims.... The rule thereby established may be summed up thus: The fact of damages, as well as the amount thereof, is entirely a question of sufficiency of evidence. In every case, the question is whether the data of which the evidence consists is such that a just and reasonable reference and estimate thereof can reasonably be drawn from the evidence so that a verdict will not be based on mere speculation or guesswork.[22]

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[22]National Wrestling Alliance v. Myers, 325 F.2d 768, 777 (8th Cir. 1963).

Although we may not ordinarily substitute our judgment for that of the jury, we are required to exercise that judgment in determining whether it is likely that the jury was actually swayed by considerations not properly before it. In fairness to both parties we do not think that the jury could reasonably have arrived at a verdict of $375,000 unless it was influenced by one or more of the above discussed improper considerations. A retrial of the damages issue is therefore necessary. We reverse the judgment of the district court insofar as it affirms the jury's award of damages and remand only on the issue of damages.

III

We do not deem it necessary to require a retrial on the issue of defendant's liability. On this question we agree with the original dissent that there is ample evidence to support a finding by the jury that the Sherman Act has been violated.

> Terrell showed the existence of the monopoly, the vigorous efforts of Household and Rand McNally to preserve that monopoly, that Terrell's directory, so often on the verge of success, was destroyed by his competitors and the monopoly remains intact to the disadvantage of the shipping public.[23]

The evidence of the record convinces us that the Bureau could be found guilty either of conspiracy in restraint of trade in violation of § 1, of the Sherman

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[23] 417 F.2d at 55 (dissenting opinion).

Act[24] or of monopolization in violation of § 2.[25]

The Federal Rules of Civil Procedure are liberal in favoring the admissibility of evidence if there is any theory justifying its admission, and the trial judge is given broad discretion in making this determinaton.[26] The jury heard no evidence that it was not entitled to hear on this issue. *Res Judicata* does not make the Wyche letter inadmissible in this antitrust action. Evidence relating to the transactions with the government are admissible under *Pennington* to show the "purpose and character" of the Bureau's dealings in non-governmental transactions.[27] The district court's judgment on the issue of liability is affirmed.

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[24]See, e.g., United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Griffith, 334 U.S. 100 (1948); Fashion Originators Guild of America v. FTC, 312 U.S. 457 (1941); United States v. Standard Oil Co., 221 U.S. 1 (1909).

[25]See, e.g., United States v. Griffith, 334 U.S. 100, 107 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

[26]Fed. R. Civ. P. 43(a). The rule has been interpreted liberally in light of the modern trend to allow the admission of any reliable evidence which tends to throw light on the circumstances surrounding the controversy. 2B Barron & Holtzoff, Federal Practice & Procedure § 962 (Wright Ed. 1961); see also Harrison v. Prather, ____ F.2d ____ (5th Cir. 1970) [No. 29023, Dec. 16, 1970] slip opinion at 14; Butler v. Southern Pacific Co., ____ F.2d ____ (5th Cir. 1970) [No. 28965, August 24, 1970]; Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[27]Other technical points raised by the appellants do not rise to the level of harmful error, and we reject them without further discussion.

AFFIRMED in part; REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

COLEMAN, Circuit Judge, with whom GOLDBERG and GODBOLD, Circuit Judges, join, concurring in part and dissenting in part.

I concur in that portion of the opinion of the Court which affirms the judgment below as to the liability of the appellant.

As to the remand for a new trial on the issue of damages, I respectfully dissent. The reasons were originally set forth in my dissent to the panel decision, 417 F.2d 61, 62, as follows:

> "Together with its claim that the verdict was without foundation, the Bureau contends that the verdict of $375,000 was excessive. I disagree. In a case such as this, it is impossible to determine damages with absolute certainty. As we have said, 'Once the fact of injury is established, the jury has considerable leeway in assessing the amount of damages', Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 5 Cir., 1967, 383 F.2d 97, 103, 106.
>
> "Both Terrell and an accountant testified that he spent in excess of $150,000 to compute and publish the guide. Terrell also testified that he knew he would lose money on the Oil Field Haulers Association contract, but could

gain it back when he got a foothold in the market. He anticipated sales of 22,500 copies and publication every two years. This number, based on the amount purchased by the Bureau, was not clearly unreasonable. Colonel Branigan of D.T.M.S. expressed the opinion that if the Terrell guide were accepted by D.T.M.S., other carriers would change over to it. Mr. Wyche himself stated that if another guide existed which lowered charges, *the Bureau would be forced to file an identical guide.*

"Of course, Terrell never received these benefits and the profits he anticipated were never realized. But had Terrell been permitted to compete and sell his 22,500 guides at $15 per copy, his gross profit would have been $337,500. In addition, Terrell had an agreement to publish a second national guide for the Oil Field Haulers Association for $20,000 and a tentative agreement to publish a four and eight state guide for $54,000. Because of the defendant's activities these agreements were never carried out.

"On the basis of these facts, the verdict of $375,000 was not so clearly excessive as to jusify appellate interference.

"In view of the foregoing, I would unhesitatingly affirm the judgment of the District Court as to Household Goods Carriers' Bureau.

> From our failure to do so I respectfully dissent."

AINSWORTH, Circuit Judge, with whom BELL and SIMPSON, Circuit Judges, join, concurring in part and dissenting in part:

I respectfully dissent from the majority opinion which affirms the judgment below against the Bureau on the issue of liability and remands for retrial only on the issue of damages. I concur, however, in the remand on the damages issue.

The question of the Bureau's liability was not fairly tried before the jury below, and because of prejudicial errors at the trial, a full and complete retrial should be ordered. A review of the proceedings shows that at the heart of plaintiff's case is the Wyche letter with its allegedly libelous statements against Terrell. The letter was admitted in evidence, over objection, though the Bureau had previously paid $10,000 to Terrell to settle the libel suit based on the letter. Settlement of the libel suit should have ended the Wyche letter question. Otherwise, Terrell would be allowed to maintain two actions, libel and antitrust, out of the same letter. Cf., e. g., *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 5 Cir., 1961, 295 F.2d 362. Further, he was permitted improperly to use the so-called libelous portions of the letter as the central evidence of overt acts in his antitrust suit. No limiting or cautionary instruction was given by the Court when the evidence was received. The majority opinion holds that the Wyche letter was properly received in evidence,

yet concedes the harm to the Bureau's case which resulted from its use, especially in the closing argument of plaintiff's counsel to the jury. As the majority puts it, "In our opinion plaintiff's attorney's emphasis on the known falsity of the letter, while entirely proper on the issue of defendants' intent to exclude competition unlawfully, implicitly invited the jury to award damages for the libel." The Trial Court's one-sentence admonition to the jury in its lengthy charge that no damages should be awarded for the statements in the Wyche letter, was hardly adequate to offset the harm, as the majority agrees in its opinion when it states, "Moreover, we are in agreement with the original majority in their conclusion that the trial court's limiting instruction was not sufficient to alleviate this very real danger that the jury would apply an improper measure of damages."

Prejudicial error which flowed from improper use of the Wyche letter requires a new trial, not only on the measure of damages, but especially as to liability itself. It is extremely doubtful that the jury would have held that the Bureau was liable except for the harmful and prejudicial use of the Wyche letter. The distinction is too fine to comprehend that the letter was prejudicial only in that the jury was allowed to apply an improper

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[1]The defendant Bureau points out in its brief on rehearing en banc that the Wyche letter was read in full to the jury and plaintiff Terrell testified to statements in the letter which he declared were false. In his final address plaintiff's counsel said the letter "was vicious," "was untrue," and "was calculated." This demonstrates quite clearly the serious prejudicial effect which results from admitting this evidence even for the so-called "limited" purpose.

measure of damages, but not also prejudicial on the question of liability itself. A lay jury certainly should not be expected to understand a distinction that subtle.

Improper use of the Wyche letter in itself is sufficient to warrant a new trial on all issues, but when compounded with what the majority terms "a flood of evidence tending to show attempts by both parties to influence the respective government agencies," the prejudicial effect becomes much greater and it is even more apparent that the Bureau did not receive a fair trial below. The Trial Court applied the Noerr-Pennington rule (*Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 81 S. Ct. 523 (1961); *United Mine Workers of America v. Pennington*, 381 U. S. 657, 85 S. Ct. 1585 (1965)) when he stated in his pretrial order that plaintiff could not recover any damages as a result of any action of the Finance Center, DTMS, or any other agency of the United States, and further in prohibiting counsel for plaintiff from referring without the Court's prior consent to any of the dealings between the parties and the two government agencies involved. Despite the order of the Court, the case was inundated by "a flood of evidence" properly admitted according to the majority, to show the "purpose and character of the transactions under scrutiny" in accordance with a phrase taken from a footnote in the *Pennington* decision. *Pennington*, supra, 381 U.S. at 670-71 n. 3, 85 S. Ct. at 1593. But according to the *Pennington* note the Trial Judge should admit this evidence "if he deemed it probative and *not unduly prejudicial.*" (Emphasis supplied.)

Under the circumstances the footnoted observation in the majority opinion (n. 13) is both interesting and informative. The majority states, "Thus, we agree with the original panel majority that the case has been mishandled and disagree only as to the scope of the prejudice growing out of the mishandling."

The evidence relating to efforts of the parties to influence government agencies is inadmissible in view of the Noerr-Pennington rule that such activities are exempt from the provisions of the Sherman Act. Once this evidence was admitted — contrary to the Trial Judge's pretrial order — the Court's subsequent brief charge to the jury that damages cannot be allowed for any activities relating to governmental agencies obviously does not cure its prejudicial effect. Since, as the majority points out, "There was no limiting instruction given upon introduction of the evidence..." the prejudice is even greater. The original panel majority opinion is quite explicit in regard to the admissibility of evidence. It states in pertinent part (417 F. 2d 47, 52), "This is not a situation where the evidence might be regarded as cumulative; quite the contrary, the danger here is that the 'purpose and character' evidence will receive such force and weight so as to preclude a fair verdict on the substantive basis of the claim." (Footnotes omitted.) It is difficult to understand, as with the Wyche letter, how this detrimental and prejudicial evidence can be received but, nevertheless, how its effect can later be dissipated by cautionary instructions to the jury. This requires more of a jury than we have a right to expect.

A fair verdict was not possible under the circumstances which prevailed in the trial of this case. Justice between the parties would best be assured by retrial of the entire matter, as was ordered by the original panel decision herein. Since, however, a majority of the en banc court has determined that the judgment as to liability should be affirmed, I have concluded to join in the remand on the issue of damages only, while reiterating my dissent on the liability question.

JONES, Circuit Judge, Dissenting:

I believe the decision of the panel of this Court is right and the opinion of Judge Choate is sound. I dissent from the action of the Court en banc.

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